# TEXAS REGISTER

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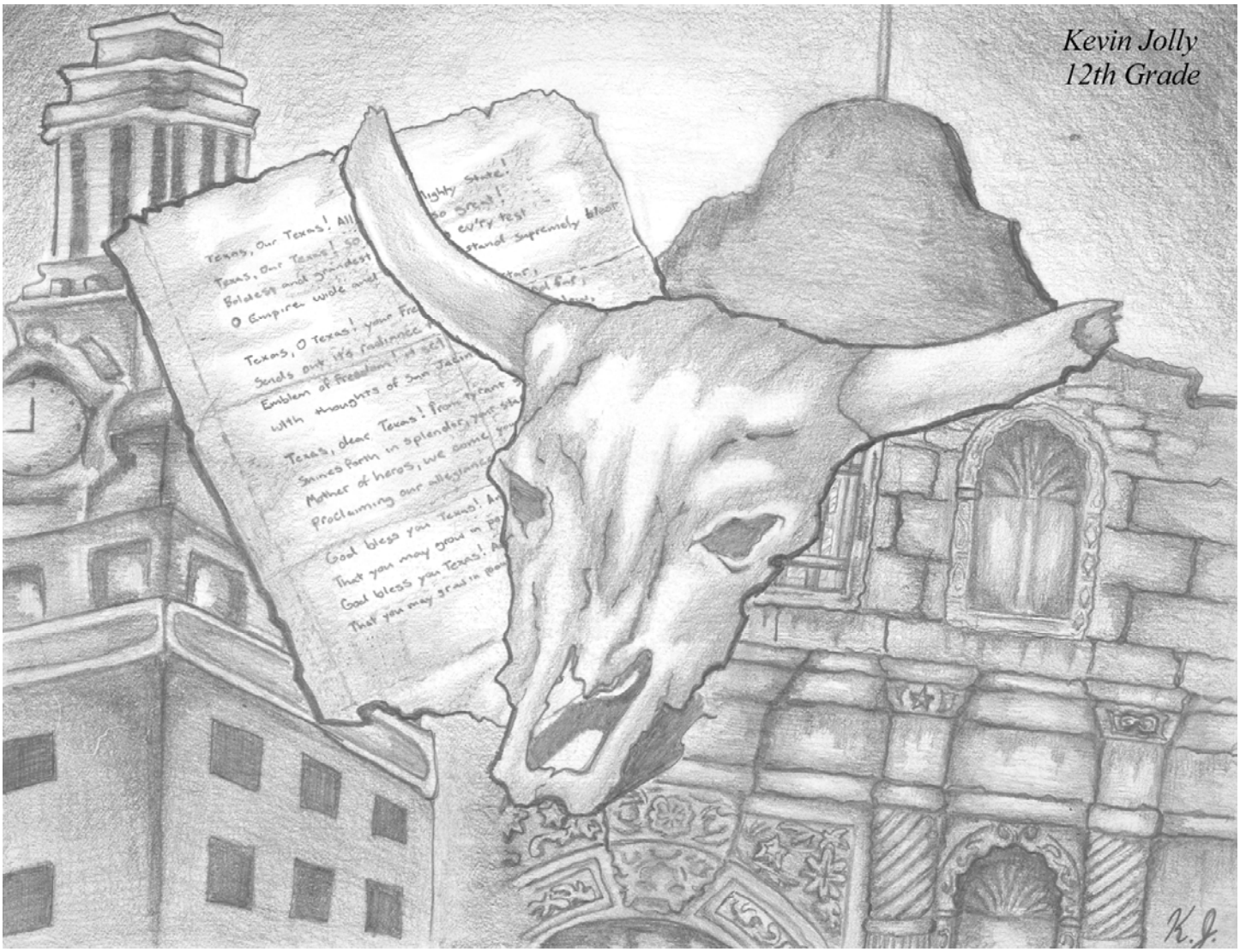

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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# IN THIS ISSUE

## *RULE REVIEW*



## *TABLES AND GRAPHICS*



## *IN ADDITION*

# THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

## Appointments

**Appointments for February 19, 2008**

Appointed to the State Board of Educator Certification for a term to expire February 1, 2009, Ms. Michael L. Acuff of Fort Worth (replacing Cynthia M. Saenz of Austin who resigned).

Appointed to the Texas State Library and Archives Commission for a term to expire September 28, 2013, Michael Cooper Waters of Abilene (replacing Diana Rae Hester Cox of Canyon whose term expired).

Appointed to the Texas State Library and Archives Commission for a term to expire September 28, 2013, William Scott McAfee of Driftwood (replacing Sandra Gunter Holland of Pleasanton whose term expired).

**Appointments for February 20, 2008**

Appointed to the Texas Water Development Board for a term to expire December 31, 2013, Edward Vaughan of Boerne (replacing Dario Vida Guerra of Edinburg whose term expired).

Appointed to the Parks and Wildlife Commission for a term to expire February 1, 2013, Ralph H. Duggins, III of Fort Worth (replacing Philip Montgomery of Dallas whose term expired).

Appointed to the Texas Skill Standards Board for a term to expire at the pleasure of the Governor, Edward C. Foster, Jr. of Hurst (replacing Beth Graham of Longview).

Appointed to the Camino Real Regional Mobility Authority for a term to expire February 1, 2009, Harold Hahn of El Paso (replacing John Broaddus of El Paso who resigned).

Rick Perry, Governor

TRD-200801075

♦ ♦ ♦

## Proclamation 41-3041

TO ALL TO WHOM THESE PRESENTS SHALL COME:

I, RICK PERRY, Governor of Texas, do hereby amend my January 29, 2008, proclamation to include Bailey, Blanco, Borden, Burleson, Burnet, Caldwell, Callahan, Cherokee, Coleman, Collin, Dawson, Duval, Falls, Floyd, Gaines, Gillespie, Glasscock, Gonzales, Hopkins, Houston, Jack, Lubbock, Montgomery, Moore, Orange, Reeves, Rusk, Terrell, Walker, Williamson and Zapata Counties, certifying that these counties are currently threatened by extreme fire hazard. .

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby proclaim the existence of such threat and direct that all necessary measures both public and private as authorized under Section 418.015 of the code be implemented to meet that threat.

As provided in section 418.016, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the incident.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 1st day of February, 2008.

Rick Perry, Governor

Attested by: Phil Wilson, Secretary Of State

TRD-200801124

♦ ♦ ♦

## Proclamation 41-3042

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, the resignation of the Honorable Robert R. Puente has caused a vacancy to exist in the Texas House of Representatives District No. 119 which consists of part of Bexar County; and

WHEREAS, Article III, Section 13 of the Texas Constitution and Section 203.002 of the Texas Election Code require that a special election be ordered upon such vacancy; and

WHEREAS, Section 3.003 of the Texas Election Code, requires the election to be ordered by proclamation of the Governor;

NOW, THEREFORE, I, RICK PERRY, Governor of Texas, under the authority vested in me by the Constitution and Statutes of the State of Texas, do hereby order a special election to be held in District No. 119 on May 10, 2008, for the purpose of electing a State Representative for House District No. 119 to serve out the unexpired term of the Honorable Robert R. Puente.

Candidates who wish to have their names placed on the special election ballot must file their applications with the Secretary of State no later than 5:00 p.m. on March 4, 2008.

Early voting by personal appearance shall begin on Monday, April 28, 2008 and end on Tuesday, May 6, 2008, in accordance with Section 85.001 of the Texas Election Code.

A copy of this order shall be mailed immediately to the County Judge of Bexar County; and all appropriate writs will be issued and all proper proceedings will be followed for the purpose that said election may be held to fill the vacancy in District No. 119 and its result proclaimed in accordance with law.

IN TESTIMONY WHEREOF, I have hereto signed my name and have officially caused the Seal of State to be affixed at my Office in the City of Austin, Texas, this the 15th day of February, 2008.

Rick Perry, Governor

Attested by: Phil Wilson, Secretary of State

TRD-200801076

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# THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

**RQ-0675-GA**

**Requestor:**

The Honorable Donnis M. Scott

Lynn County Attorney

Post Office Box 848

Tahoka, Texas 79373-0848

Re: Status of the offices of district and county clerks, and the offices of county tax assessor-collector and sheriff when the population of a county falls below 8,000 residents (RQ-0675-GA)

**Briefs requested by March 20, 2008**

**RQ-0676-GA**

**Requestor:**

Mr. Jesse R. Adams, Chair

Texas Racing Commission

Post Office Box 12080

Austin, Texas 78711-2080

Re: Authority of the Texas Racing Commission to issue an interim license to conduct a race meeting (Request No. 0676-GA)

**Briefs requested by March 24, 2008**

*For further information, please access the Web site at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.*

TRD-200801156
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: February 27, 2008

♦ ♦ ♦

# EMERGENCY RULES

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034). An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days. (Government Code, §2001.034).

## TITLE 13. CULTURAL RESOURCES

## PART 3. TEXAS COMMISSION ON THE ARTS

### CHAPTER 31. AGENCY PROCEDURES

**13 TAC §31.5, §31.11**

The Texas Commission on the Arts adopts on an emergency basis an amendment to §31.5, concerning Staff, and §31.11, concerning Gifts, Grants, and Donations. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously proposes amendments to §31.5 and §31.11 for permanent adoption.

The purpose of the amendment to §31.5 is to address issues related to employees of the Commission. The change to the rule removes references to procedures related to the Texas Cultural Endowment Fund. Issues related to the Texas Cultural Endowment Fund are addressed in the Texas Government Code §444.026 and in the Commission's Investment Policy and Gift Acceptance Policy.

Section 31.11(c)(5) does not accurately reflect the work of the Commission. The Commission does accept restricted gifts intended for the sole benefit of a single organization. Therefore the rule is being amended.

The amendments are adopted on an emergency basis to reflect agency restructuring and its goals and strategies.

The amendments are adopted on an emergency basis under the Texas Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

No other statutes, articles or codes are affected by the amendments.

*§31.5. Staff.*

(a) Within the policies and guidelines established by the commission, the executive director shall have the responsibility to develop programs, employ staff, and to carry out operations. The executive director shall be an ex officio member of all commission committees except the Officer Nominating Committee. [~~Prior to making a transfer or withdrawal of funds from any Cultural Trust Endowment Fund Account, authorized officials of the Texas Commission on the Arts must obtain director approval, which can be obtained by fax, from the Commission's chairman or the Commission's treasurer. All such actions must not be inconsistent with approved investment policy. Any funds received must be deposited in the Cultural Trust Endowment Fund account within three business days. Authorized officials are the Executive Director, the Deputy Director and the Director of Finance and Administration of the Texas Commission on the Arts.~~]

(b) - (c) (No change.)

*§31.11. Gifts, Grants, and Dontations.*

(a) - (b) (No change.)

(c) Restricted Gifts.

(1) - (4) (No change.)

[~~(5) The Commission will not accept restricted gifts intended for the sole benefit of a single organization.~~]

(5) [~~(6)~~] Any organization receiving a grant/contract as a result of a restricted gift must provide evidence of sound administrative and fiscal management practices, comply with the Commission's general eligibility rules and guidelines, and meet the requirements of the restrictions placed on the gift by the donor.

(6) [~~(7)~~] Any organization receiving a grant/contract as a result of a restricted donation must provide acknowledgment of receipt of the gift from the donor and the Commission as appropriate.

(d) - (f) (No change.)

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200801012
Gary Gibbs
Executive Director
Texas Commission on the Arts
Effective Date: February 19, 2008
Expiration Date: June 17, 2008
For further information, please call: (512) 936-6564

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### CHAPTER 32. MEMORANDA OF UNDERSTANDING

The Texas Commission on the Arts (TCA) adopts on an emergency basis the repeal and replacement of §32.1 concerning Memoranda of Understanding. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously proposes the repeal and replacement of §32.1 for permanent adoption.

Section 32.1 does not address all of the Memorandum of Understanding (MOU) agreements TCA is currently required to have in place and does not address the issue of future MOU agreements. This repeal and new section will remedy both of those issues.

The repeal and new section are adopted on an emergency basis to reflect agency restructuring and its goals and strategies.

**13 TAC §32.1**

*(Editor's note: The text of the following section adopted for repeal on an emergency basis will not be published. The section may be examined in the offices of the Texas Commission on the Arts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The repeal is adopted on an emergency basis under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

No other statutes, articles or codes are affected by the repeal.

*§32.1. Memorandum of Understanding with the Texas Department of Economic Development, the Texas Department of Transportation, the Texas Parks and Wildlife Department, the Texas Commission on the Arts, and the Texas Historical Commission.*

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200801013
Gary Gibbs
Executive Director
Texas Commission on the Arts
Effective Date: February 19, 2008
Expiration Date: June 17, 2008
For further information, please call: (512) 936-6564

♦ ♦ ♦

**13 TAC §32.1**

The new section is adopted on an emergency basis under the Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

No other statutes, articles or codes are affected by the new section.

*§32.1. Memoranda of Understanding.*

(a) The Texas Commission on the Arts (TCA) shall enter into Memorandum of Understanding (MOU) agreements as outlined in §444.030 of the Texas Government Code.

(b) TCA may enter into additional MOU agreements with other state agencies and/or partners. MOU agreements may result from Legislation or be initiated by the Commission for the purpose of furthering the agency's mission and goals.

This agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200801014
Gary Gibbs
Executive Director
Texas Commission on the Arts
Effective Date: February 19, 2008
Expiration Date: June 17, 2008
For further information, please call: (512) 936-6564

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# PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

**Symbols in proposed rule text.** Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

## TITLE 7. BANKING AND SECURITIES

## PART 7. STATE SECURITIES BOARD

## CHAPTER 117. ADMINISTRATIVE GUIDELINES FOR REGISTRATION OF REAL ESTATE PROGRAMS

**7 TAC §§117.1 - 117.9**

*(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the State Securities Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas State Securities Board proposes the repeal of Chapter 117, consisting of §§117.1 - 117.9, concerning administrative guidelines for registration of real estate programs. The chapter is being proposed for repeal so that it can be replaced by a new chapter, which is being concurrently proposed.

Micheal Northcutt, Director, Registration Division, has determined that, for the first five-year period the repeal is in effect, there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Northcutt also has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be the elimination of outdated rules. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed repeal in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The repeal is proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposed repeal affects Texas Civil Statutes, Article 581-7.

*§117.1. Introduction.*
*§117.2. Requirements of Sponsors.*
*§117.3. Suitability of Participants.*
*§117.4. Fees--Compensation--Expenses.*
*§117.5. Conflicts of Interest and Investment Restrictions.*
*§117.6. Nonspecified Property Programs.*
*§117.7. Rights and Obligations of Participants.*
*§117.8. Disclosure and Marketing Requirements.*
*§117.9. Miscellaneous Provisions.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200801005
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 305-8303

♦ ♦ ♦

**7 TAC §§117.1 - 117.9**

The Texas State Securities Board proposes new Chapter 117, consisting of §§117.1 - 117.9, concerning administrative guidelines for registration of real estate programs. The new chapter would replace existing Chapter 117, which is being concurrently proposed for repeal, with updated administrative guidelines recently adopted by the North American Securities Administrators Association, Inc. (NASAA). In related rulemaking, the Board is proposing to repeal existing §133.31, a form concerning the real estate guidelines cross reference sheet, to allow for the simultaneous adoption of an updated form adopted by NASAA.

The proposed new chapter incorporates the statement of policy regarding real estate programs adopted by NASAA, with minor changes, and the NASAA policies are applied by a number of other states registering such programs.

Micheal Northcutt, Director, Registration Division, has determined that, for the first five-year period the rules are in effect, there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rules.

Mr. Northcutt also has determined that, for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be that uniform rules, developed in coordination with securities administrators in other jurisdictions, will be used in regulating real estate programs. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed sections in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The new rules are proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposed new rules affect Texas Civil Statutes, Article 581-7.

*§117.1. Introduction.*

(a) Application.

(1) The rules contained in these guidelines apply to qualifications and registrations of real estate programs in the form of limited partnerships (herein sometimes called "program" or "partnerships") and will be applied by analogy to real estate programs in other forms. While applications not conforming to the standards contained herein shall be looked upon with disfavor, where good cause is shown certain guidelines may be modified or waived by the Securities Commissioner.

(2) Where the individual characteristics of specific programs warrant modification from these standards, they will be accommodated, insofar as possible while still being consistent with the spirit of these guidelines. A cross reference sheet on Form 133.31 or a reproduction thereof shall be furnished with the application.

(3) Where these guidelines conflict with requirements of the Securities and Exchange Commission, the guidelines will not apply.

(b) Definitions. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Acquisition expenses--Expenses including, but not limited to, legal fees and expenses, travel and communications expenses, costs of appraisals, non-refundable option payments on property not acquired, accounting fees and expenses, title insurance, and miscellaneous expenses related to selection and acquisition of properties, whether or not acquired.

(2) Acquisition fee--The total of all fees and commissions paid by any party in connection with making or investing in mortgage loans or the purchase, development, or construction of property by a program. Included in the computation of such fees or commissions shall be any real estate commission, selection fee, development fee, construction fee, nonrecurring management fee, loan fees or points paid by borrowers to the sponsor in programs which make or invest in mortgage loans, or any fee of a similar nature, however designated. Excluded shall be development fees and construction fees paid to persons not affiliated with the sponsor in connection with the actual development and construction of a project.

(3) Administrator--Referred to as Securities Commissioner throughout this chapter.

(4) Affiliate--

(A) any person directly or indirectly controlling, controlled by, or under common control with another person;

(B) any person owning or controlling 10% or more of the outstanding voting securities of such other person;

(C) any officer, director, partner of such person; and

(D) if such other person is an officer, director, or partner, any company for which such person acts in any such capacity.

(5) Assessments--Additional amounts of capital which may be mandatorily required of or paid at the option of a participant beyond his subscription commitment excluding mandatory deferred payments.

(6) Asset based fee--Compensation to a sponsor computed according to §117.4(j) of this title.

(7) Audited financial statements--Financial statements (balance sheet, statement of income, statement of partners' equity, and statement of cash flows) prepared in accordance with generally accepted accounting principles and accompanied by an independent auditor's report containing:

(A) an unqualified opinion;

(B) an opinion containing no material qualification; or

(C) no explanatory paragraph disclosing information relating to material uncertainties (except as to litigation) or going concern issues.

(8) Base amount--That portion of the capital contributions originally committed to investment in properties without regard to leverage and including working capital reserves allowable under §117.4(j)(1)(C) of this title. The base amount shall be recomputed annually by subtracting from the then fair market value of the program's real properties as determined by independent appraisals plus the working capital reserves allowable under §117.4(j)(1)(C), an amount equal to the outstanding debt secured by the program's properties.

(9) Capital contribution--The gross amount of investment in a program by a participant, or all participants as the case may be. Unless otherwise specified, capital contribution shall be deemed to include principal amounts to be received on account of mandatory deferred payments.

(10) Carried interest--An equity interest in a program which participates in all allocations and distributions other than the promotional interest provided for in §117.4(c)(3)(A), (e)(1), and (e)(2) of this title, for which full consideration is not paid or to be paid.

(11) Cash available for distribution--Cash flow less amount set aside for restoration or creation of reserves.

(12) Cash flow--Program cash funds provided from operations, including lease payments on net leases from builders and sellers, without deduction for depreciation, but after deducting cash funds used to pay all other expenses, debt payments, capital improvements, and replacements.

(13) Competitive real estate commission--That real estate or brokerage commission paid for the purchase or sale of property which is reasonable, customary, and competitive in light of the size, type, and location of the property.

(14) Construction fee--A fee or other remuneration for acting as general contractor and/or construction manager to construct improvements, supervise, and coordinate projects or to provide major repairs or rehabilitation on a program's property.

(15) Cross-reference sheet--A compilation of the guideline sections, referenced to the page of the prospectus, partnership agreement, or other exhibits, and justification of any deviation from the guidelines.

(16) Development fee--A fee for the packaging of a program's property, including negotiating and approving plans, and undertaking to assist in obtaining zoning and necessary variances and necessary financing for the specific property, either initially or at a later date.

(17) Financing--All indebtedness encumbering program properties or incurred by the program, the principal amount of which is scheduled to be paid over a period of not less than 48 months, and not more than 50% of the principal amount of which is scheduled to be paid during the first 24 months. Nothing in this definition shall be construed as prohibiting a bona-fide pre-payment provision in the financing agreement.

(18) Front-end fees--Fees and expenses paid by any party for any services rendered to organize the program and to acquire assets for the program, including organization and offering expenses, acquisition fees, acquisition expenses, interest on deferred fees and expenses, and any other similar fees, however designated by the sponsor.

(19) Independent expert--A person with no material current or prior business or personal relationship with the sponsor who is engaged to a substantial extent in the business of rendering opinions regarding the value of assets of the type held by the program, and who is qualified to perform such work.

(20) Investment in properties--The amount of capital contributions used to make or invest in mortgage loans or the amount actually paid or allocated to the purchase, development, construction, or improvement of properties acquired by the program (including the purchase of properties, working capital reserves allocable thereto (except that working capital reserves in excess of 5.0% shall not be included), and other cash payments such as interest and taxes but excluding front-end fees).

(21) Mandatory deferred payments--Payments on account of the purchase price of program interests offered in accordance with 17 CFR 240.3a12-9.

(22) Major repairs and rehabilitation--The repair, rehabilitation, or reconstruction of a property where the aggregate costs exceed 10% of the fair market value of the property at the time of such services.

(23) Net worth--The excess of total assets over total liabilities as determined by generally accepted accounting principles, except that if any of such assets have been depreciated, then the amount of depreciation relative to any particular asset may be added to the depreciated cost of such asset to compute total assets, provided that the amount of depreciation may be added only to the extent that the amount resulting after adding such depreciation does not exceed the fair market value of such asset.

(24) Non-specified property programs--Programs other than specified property programs.

(25) Organization and offering expenses--Those expenses incurred in connection with and in preparing a program for registration and subsequently offering and distributing it to the public, including sales commissions paid to broker-dealers in connection with the distribution of the program and all advertising expenses.

(26) Roll-up--A transaction involving the acquisition, merger, conversion, or consolidation, either directly or indirectly of the program and the issuance of securities of a roll-up entity. Such term does not include:

(A) a transaction involving securities of the program that have been listed for at least 12 months on a national securities exchange or traded through the National Association of Securities Dealers Automated Quotation National Market System; or

(B) a transaction involving the conversion to corporate, trust, or association form of only the program if, as a consequence of the transaction, there will be no significant adverse change in any of the following:

*(i)* participants' voting rights;

*(ii)* the term of existence of the program;

*(iii)* sponsor compensation; or

*(iv)* the program's investment objectives.

(27) Roll-up entity--A partnership, real estate investment trust, corporation, trust, or other entity that would be created or would survive after the successful completion of a proposed roll-up transaction.

(28) Participant--The holder of a program interest.

(29) Person--Any natural person, partnership, corporation, association, or other legal entity.

(30) Program--A limited or general partnership, joint venture, unincorporated association, or similar organization other than a corporation formed and operated for the primary purpose of investment in and the operation of or gain from an interest in real property including such entities formed to make or invest in mortgage loans.

(31) Program interest--The limited partnership unit or other indicia of ownership in a program.

(32) Program management fee--A fee paid to the sponsor or other persons for management and administration of the program.

(33) Property management fee--The fee paid for day-to-day professional property management services in connection with a program's real property projects.

(34) Prospectus--Shall have the meaning given to that term by the Securities Act of 1933, §2(10), including a preliminary prospectus; provided, however, that such term as used herein shall also include an offering circular as described in Rule 256 of the General Rules and Regulations under the Securities Act of 1933 or, in the case of an intrastate offering, any document by whatever name known, utilized for the purpose of offering and selling securities to the public.

(35) Purchase price--The price paid upon the purchase or sale of a particular property, including the amount of acquisition fees and all liens and mortgages on the property, but excluding points and prepaid interest.

(36) Specified property program--A program where, at the time a securities registration is ordered effective, more than 75% of the net proceeds from the sale of program interests is allocable to the purchase, construction, or improvement of specific properties. Reserves shall be included in the non-specified portion. Net proceeds shall include principal amounts to be received on account of mandatory deferred payments.

(37) Sponsor--Any person directly or indirectly instrumental in organizing, wholly or in part, a program or any person who will manage or participate in the management of a program, and any affiliate of any such person, but does not include a person whose only relation with the program is as that of an independent property manager, whose only compensation is as such. "Sponsor" does not include wholly independent third parties such as attorneys, accountants, and underwriters

whose only compensation is for professional services rendered in connection with the offering of syndicate interests. A person may also be a sponsor of the program by:

(A) taking the initiative, directly or indirectly, in founding or organizing the business or enterprise of the program, either alone or in conjunction with one or more other persons;

(B) receiving a material participation in the program in connection with the founding or organizing of the business of the program, in consideration of services or property, or both services and property;

(C) having a substantial number of relationships and contacts with the program;

(D) possessing significant rights to control program properties;

(E) receiving fees for providing services to the program which are paid on a basis that is not customary in the industry; or

(F) providing goods or services to the program on a basis which was not negotiated at arm's-length with the program.

*§117.2. Requirements of Sponsors.*

(a) Experience. The sponsor, the general partner, or their chief operating officers shall have at least two years relevant real estate or other experience demonstrating the knowledge and experience to acquire and manage the type of assets being acquired, and any of the foregoing or any affiliate providing services to the program shall have had not less than four years relevant experience in the kind of service being rendered or otherwise must demonstrate sufficient knowledge and experience to perform the services proposed.

(b) Net worth requirement of sponsor. The financial condition of the sponsor liable for the debts of the program must be commensurate with any financial obligations assumed in the offering and in the operation of the program. As a minimum, such sponsor shall have an aggregate financial net worth, exclusive of home, automobile, and home furnishings, of the greater of either $50,000 or an amount at least equal to 5.0% of the gross amount of all offerings sold within the prior 12 months, plus 5.0% of the gross amount of the current offering, to an aggregate maximum net worth of such sponsor of $1 million. In determining net worth for this purpose, evaluation will be made of contingent liabilities and the use of promissory notes, to determine the appropriateness of their inclusion in computation of net worth.

(c) Reports to Securities Commissioner. Each application for registration shall contain a commitment, executed by the sponsor, to submit to the Securities Commissioner upon request any report or statement required to be distributed to limited partners pursuant to §117.7(c) of this title.

(d) Liability and indemnification.

(1) The program shall not provide for indemnification of the sponsor for any liability or loss suffered by the sponsor, nor shall it provide that the sponsor be held harmless for any loss or liability suffered by the program, unless all of the following conditions are met:

(A) the sponsor has determined, in good faith, that the course of conduct which caused the loss or liability was in the best interests of the program;

(B) the sponsor was acting on behalf of or performing services for the program;

(C) such liability or loss was not the result of negligence or misconduct by the sponsor; and

(D) such indemnification or agreement to hold harmless is recoverable only out of the assets of the program and not from the participants.

(2) Notwithstanding anything to the contrary contained in paragraph (1) of this subsection, the sponsor (which shall include affiliates only if such affiliates are performing services on behalf of the program) and any person acting as a broker-dealer shall not be indemnified for any losses, liabilities, or expenses arising from or out of an alleged violation of federal or state securities laws unless the following conditions are met:

(A) there has been a successful adjudication on the merits of each count involving alleged securities law violations as to the particular indemnitee;

(B) such claims have been dismissed with prejudice on the merits by a court of competent jurisdiction as to the particular indemnitee; or

(C) a court of competent jurisdiction approves a settlement of the claims against a particular indemnitee and finds that indemnification of the settlement and related costs should be made; and the court of law considering the request for indemnification has been advised of the position of the Securities and Exchange Commission and the position of any state securities regulatory authority in which securities of the program were offered or sold as to indemnification for violations of securities laws; provided that the court need only be advised of and consider the positions of the securities regulatory authorities of those states:

*(i)* which are specifically set forth in the program agreement; and

*(ii)* in which plaintiffs claim they were offered or sold program interests.

(3) The program may not incur the cost of that portion of liability insurance which insures the sponsor for any liability as to which the sponsor is prohibited from being indemnified under this section.

(4) The provision of advancement from program funds to a sponsor or its affiliates for legal expenses and other costs incurred as a result of any legal action is permissible if the following conditions are satisfied:

(A) the legal action relates to acts or omissions with respect to the performance of duties or services on behalf of the program;

(B) the legal action is initiated by a third party who is not a participant, or the legal action is initiated by a participant and a court of competent jurisdiction specifically approves such advancement; and

(C) the sponsor or its affiliates undertake to repay the advanced funds to the program in cases in which such person is not entitled to indemnification under paragraph (1) of this subsection.

(e) Fiduciary duty. The program agreement shall provide that the sponsor shall have fiduciary responsibility for the safekeeping and use of all funds and assets of the program, whether or not in the sponsor's possession or control, and that the sponsor shall not employ, or permit another to employ such funds or assets in any manner except for the exclusive benefit of the program. In addition, the program shall not permit the participant to contract away the fiduciary duty owed to the participant by the sponsor under the common law.

(f) Terminated sponsor.

(1) Upon the occurrence of a terminating event, the partnership may be required to pay to the terminated sponsor all amounts

then accrued and owing to the terminated sponsor. Additionally, the partnership may terminate the sponsor's interest in partnership income, losses, distributions, and capital by payment of an amount equal to the then present fair market value of the terminated sponsor's interest determined by agreement of the terminated sponsor and the partnership, or, if they cannot agree, by arbitration in accordance with the then current rules of the American Arbitration Association. The expense of arbitration shall be borne equally by the terminated sponsor and the partnership.

(2) The method of payment to the terminated sponsor must be fair; and must protect the solvency and liquidity of the partnership. Where the termination is voluntary, the method of payment will be deemed presumptively fair where it provides for a non-interest bearing unsecured promissory note with principal payable, if at all, from distributions which the terminated sponsor otherwise would have received under the partnership agreement had the sponsor not terminated. Where the termination is involuntary, the method of payment will be deemed presumptively fair where it provides for an interest bearing promissory note coming due in no less than five years with equal installments each year.

*§117.3. Suitability of Participants.*

(a) General policy.

(1) The sponsor shall establish minimum income and net worth standards for persons who purchase program interests.

(2) The sponsor shall propose minimum income and net worth standards which are reasonable given the type of program and the risks associated with the purchase of program interests. Programs with greater investor risk shall have minimum standards with a substantial net worth requirement. The Securities Commissioner shall evaluate the standards proposed by the sponsor when the program's application for registration is reviewed. In evaluating the proposed standards, the Securities Commissioner may consider the following:

(A) the program's use of leverage;

(B) tax implications;

(C) mandatory deferred payments;

(D) assessments;

(E) balloon payment financing;

(F) investments in unimproved land;

(G) potential variances in cash distributions;

(H) potential participants;

(I) relationship between potential participants and the sponsor;

(J) liquidity of program interests;

(K) performance of sponsor's prior programs;

(L) financial condition of the sponsor;

(M) potential transactions between the program and the sponsor; and

(N) any other relevant factors.

(b) Income and net worth standards.

(1) For programs other than programs with mandatory deferred payments, unless the Securities Commissioner determines that the risks associated with the program would require lower or higher standards, each participant shall have:

(A) a minimum annual gross income of $70,000 and a minimum net worth of $70,000; or

(B) a minimum net worth of $250,000.

(2) For programs with mandatory deferred payments, unless the Securities Commissioner determines that the risks associated with the program would require lower or higher standards, each participant shall have:

(A) a minimum annual gross income of $85,000 and a minimum net worth of $85,000; or

(B) a minimum net worth of $330,000.

(3) Net worth shall be determined exclusive of home, home furnishings, and automobiles.

(4) In the case of sales to fiduciary accounts, these minimum standards shall be met by the beneficiary, the fiduciary account, or by the donor or grantor who directly or indirectly supplies the funds to purchase the program interests if the donor or grantor is the fiduciary.

(5) The sponsor shall set forth in the final prospectus:

(A) the investment objectives of the program;

(B) a description of the type of person who might benefit from an investment in the program; and

(C) the minimum standards imposed on each participant in the program.

(c) Determination that sale to participant is suitable and appropriate.

(1) The sponsor and each person selling program interests on behalf of the sponsor or program shall make every reasonable effort to determine that the purchase of program interests is a suitable and appropriate investment for each participant.

(2) In making this determination, the sponsor or each person selling program interests on behalf of the sponsor or program shall ascertain that the prospective participant:

(A) meets the minimum income and net worth standard established for the program;

(B) can reasonably benefit from the program based on the prospective participant's overall investment objectives and portfolio structure;

(C) is able to bear the economic risk of the investment based on the prospective participant's overall financial situation; and

(D) has apparent understanding of:

*(i)* the fundamental risks of the investment;

*(ii)* the risk that the participant may lose the entire investment;

*(iii)* the lack of liquidity of program interests;

*(iv)* the restrictions on transferability of program interests;

*(v)* the background and qualifications of the sponsor or persons responsible for directing and managing the program; and

*(vi)* the tax consequences of the investment.

(3) The sponsor or each person selling program interests on behalf of the sponsor or program will make this determination on the basis of information it has obtained from a prospective participant. Relevant information for this purpose will include at least the age, in-

vestment objectives, investment experience, income, net worth, financial situation, and other investments of the prospective participant, as well as any other pertinent factors.

(4) The sponsor or each person selling program interests on behalf of the sponsor or program shall maintain records of the information used to determine that an investment in program interests is suitable and appropriate for each participant. The sponsor or each person selling program interests on behalf of the sponsor or program shall maintain these records for at least six years.

(5) The sponsor shall disclose in the final prospectus the responsibility of the sponsor and each person selling program interests on behalf of the sponsor or program to make every reasonable effort to determine that the purchase of program interests is a suitable and appropriate investment for each participant, based on information provided by the participant regarding the participant's financial situation and investment objectives.

(d) Subscription agreements.

(1) The Securities Commissioner may require that each participant complete and sign a written subscription agreement.

(2) The sponsor may require that each participant make certain factual representations in the subscription agreement, including the following:

(A) the participant meets the minimum income and net worth standards established for the program;

(B) the participant is purchasing the program interests for his or her own account;

(C) the participant has received a copy of the prospectus; and

(D) the participant acknowledges that the investment is not liquid.

(3) The participant must separately sign or initial each representation made in the subscription agreement. Except in the case of fiduciary accounts, the participant may not grant any person a power of attorney to make such representations on his or her behalf.

(4) The sponsor and each person selling program interests on behalf of the sponsor or program shall not require a participant to make representations in the subscription agreement which are subjective or unreasonable and which:

(A) might cause the participant to believe that he or she has surrendered rights to which he or she is entitled under federal or state law; or

(B) would have the effect of shifting the duties regarding suitability, imposed by law on broker-dealers, to the participant.

(5) Prohibited representations include, but are not limited to the following:

(A) the participant understands or comprehends the risks associated with an investment in the program;

(B) the investment is a suitable one for the participant;

(C) the participant has read the prospectus; and

(D) in deciding to invest in the program, the participant has relied solely on the prospectus, and not on any other information or representations from other persons or sources.

(6) The sponsor may place the content of the prohibited representations in the subscription agreement in the form of disclosures to the participant. The sponsor may not place these disclosures in the participant representation section of the subscription agreement.

(e) Completion of sale.

(1) The sponsor or any person selling program interests on behalf of the sponsor or program may not complete a sale of program interests to a participant until at least five business days after the date the participant receives a final prospectus.

(2) The sponsor or the person designated by the sponsor shall send each participant a confirmation of his or her purchase.

(f) Minimum investment. The Securities Commissioner may require a minimum initial and subsequent cash investment amount.

*§117.4. Fees, Compensation, and Expenses.*

(a) Fees, compensation, and expenses to be reasonable.

(1) The total amount of consideration of all kinds which may be paid directly or indirectly to all parties shall be reasonable.

(2) The prospectus must fully disclose and itemize all consideration which may be received from the program directly or indirectly by the sponsor, its affiliates and underwriters, what the consideration is for and how and when it will be paid. This shall be set forth in one location in tabular form.

(b) Organization and offering expenses. All organization and offering expenses incurred in order to sell program interests shall be reasonable and shall comply with all statutes, rules, and regulations imposed in connection with the offering of other securities in the state.

(c) Investment in properties.

(1) Front-end fees.

(A) The sponsor shall be required to commit a substantial portion of the program's capital contributions toward investment in properties. The remaining capital contributions may be used to pay front-end fees. The total amount of front-end fees, whenever paid and from whatever source, shall be limited to an amount equal to the initial amount of capital contributions not applied to investment in properties. When front-end fees are paid by the seller of properties, such fees shall not be included in satisfying the required minimum investment in properties.

(B) If capital contributions are paid on an installment basis, the front-end fee shall be paid to the sponsor pro rata as installments are paid.

(C) Notwithstanding paragraphs (1)(A) and (2) of this subsection, front-end fees may be limited as required by §117.5(j) of this title. If so, the proportion of capital contributions subject to the limitations of §117.5(j) shall be the same proportion as the amount of invested assets subject to §117.5(j) to the aggregate amount of all investments of the program. Borrowed amounts shall not be included in determining the amount of investment.

(2) At a minimum, the sponsor shall commit a percentage of the capital contributions to investment in properties which is equal to 82% for programs which make or invest in mortgage loans and for all other programs is equal to the greater of:

(A) 80% of the capital contributions reduced by 0.1625% for each 1.0% of financing of program properties; or

(B) 67% of the capital contributions.

(3) If the sponsor enters into an investment in properties commitment in excess of that specified in paragraph (2) of this subsection, the following mutually exclusive forms of compensation are viewed as not unreasonable alternatives to front-end fees:

(A) the sponsor may take an additional promotional interest in the net proceeds remaining from the sale or refinancing of the properties after payment of such proceeds to participants in an amount equal to 100% of capital contributions, equal to 1.0% for each 1.0% of additional investment in properties; or

(B) the sponsor may take a carried interest which accrues and is payable from the net proceeds remaining from the sale or refinancing of properties only after payment of such proceeds to participants in an amount equal to 100% of capital contributions, equal to 1.0% for the first 2.0% of additional investment in properties, plus 1.0% for the next 1.5% of additional investment in properties, plus 1.0% for each 1.0% of additional investment in properties thereafter; or

(C) the sponsor may take a fully participating carried interest equal to 1.0% for the first 2.5% of additional investment in properties, 1.0% for the next 2.0% of additional investment in properties, and 1.0% for each 1.0% of additional investment in properties thereafter.

(4) For programs whose total capital contributions do not exceed $2 million, the Securities Commissioner may reduce the required amount of investment in properties to that permitted by paragraph (2)(B) of this subsection, notwithstanding the level of indebtedness encumbering the program's properties.

(d) Program management fee.

(1) A general partner of a program owning unimproved land shall be entitled to annual compensation not exceeding 1/4 of 1.0% of the cost of such unimproved land for operating the program until such time as the land is sold or improvement of the land commences by the limited partnership. In no event shall this fee exceed a cumulative total of 2.0% of the original cost of the land regardless of the number of years held.

(2) A general partner of a program holding property in government subsidized projects shall be entitled to annual compensation not exceeding 1/2 of 1.0% of the cost of such property for operating the program until such time as the property is sold.

(3) Program management fees other than as set forth in this subsection shall be prohibited.

(e) Promotional interest. An interest in the program will be allowed as a promotional interest and program management fee, provided the amount or percentage of such interest is reasonable. Such an interest will be considered presumptively reasonable if it is within the limitations expressed in paragraphs (1) - (5) of this subsection:

(1) an interest equal to 25% of cash to be distributed from the net proceeds remaining from the sale or refinancing of properties after payment to investors from such proceeds, an amount equal to 100% of capital contributions, plus an amount equal to 6.0% of capital contributions per annum cumulative (the 6.0% cumulative return may be reduced, but not below zero, by the aggregate amount of prior distributions to investors from cash available for distribution); or

(2) an interest equal to:

(A) 10% of distributions from cash available for distribution; and

(B) 15% of cash to be distributed from the net proceeds remaining from the sale or refinancing of properties after payment to investors from such proceeds, an amount equal to 100% of capital contributions, plus an amount equal to 6.0% of capital contributions per annum cumulative. The 6.0% cumulative return may be reduced, but not below zero, by the aggregate amount of prior distributions to investors from cash available for distribution.

(3) For purposes of this section, the capital contribution of the investors shall only be reduced by a cash distribution to investors of the proceeds from the sale or refinancing of properties. In addition, the cumulative return to each investor shall commence no later than the end of the calendar quarter in which his capital contribution is made.

(4) The distribution of assets upon dissolution and liquidation of the partnership shall conform to the applicable subordination provisions of paragraphs (1) and (2)(B) of this subsection, and appropriate language shall be included in the partnership agreement.

(5) The maximum dollar amount of the sponsors' distributive share permitted under paragraph (1) or (2) of this subsection may not be increased by any allocation to the sponsors made for the purpose of satisfying the requirements of the Internal Revenue Code, applicable regulations, or any Revenue Ruling or Revenue Procedure. In the absence of adequate justification provided under subsection (c)(3) of this section for any unsubordinated participation in cash to be distributed from the net proceeds remaining from the sale or refinancing of properties, the Securities Commissioner may require an express limitation in the program agreement that the dollar amount of the sponsors' distributive share will not exceed the maximum amount that would be allowable under paragraph (1) or (2) of this subsection.

(f) Real estate brokerage commissions on resale of property. The total compensation paid to all persons for the sale of a program property shall be limited to a competitive real estate commission, not to exceed 6.0% of the contract price for the sale of the property. If the sponsor provides a substantial amount of the services in the sales effort, he may receive up to one-half of the competitive real estate commission, not to exceed 3.0%, and subordinated as in subsection (e) of this section. If the sponsor participates with an independent broker on resale, the subordination requirement shall apply only to the commission earned by the sponsor.

(g) Property management fee. Should the sponsor or its affiliates perform property management services permitted under subsection (a)(1) of this section, the fees paid to the sponsor or its affiliates shall be the lesser of the maximum fees set forth in paragraphs (1) - (3) of this subsection, or the fees which are competitive for similar services in the same geographic area. Included in such fees shall be bookkeeping services and fees paid to nonrelated persons for property management services.

(1) In the case of a residential property, the maximum property management fee (including all rent-up, leasing, and re-leasing fees and bonuses, and leasing related services, paid to any person) shall be 5.0% of the gross revenues from such property.

(2) In the case of industrial and commercial property, except as set forth in paragraph (3) of this subsection, the maximum property management fee from such leases shall be 6.0% of the gross revenues where the sponsor or its affiliates includes leasing, re-leasing, and leasing related services. Conversely, the maximum property management fee from such leases shall be 3.0% of the gross revenues where the sponsor or its affiliates do not perform the leasing, re-leasing, and leasing related services with respect to the property.

(3) In the case of industrial and commercial properties which are leased on a long-term (10 or more years) net (or similar) bases, the maximum property management fee from such leases shall be 1.0% of the gross revenues, except for a one-time initial leasing fee of 3.0% of the gross revenues on each lease payable over the first five full years of the original term of the lease.

(h) Insurance services. The sponsor or his affiliate may provide insurance brokerage services in connection with obtaining insurance on the program's property so long as the cost of providing such

service, including cost of the insurance, is no greater than the lowest quote obtained from two unaffiliated insurance agencies and the coverage and terms are likewise comparable. In no event may such services be provided by the sponsor or his affiliate unless they are independently engaged in the business of providing such services to other than affiliates and at least 75% of their insurance brokerage service gross revenue is derived from other than affiliates.

(i) Mortgage servicing fee. The sponsor or his affiliate may provide mortgage services in programs which make or invest in mortgage loans for which he may be paid a fee which when added to all other fees paid in connection with the servicing of a particular mortgage does not exceed the lesser of the customary, competitive fee for the provision of such mortgage services on that type of mortgage or 1/4 of 1.0% of the principal outstanding in such loan.

(j) Asset based fee.

(1) Eligibility. A program may elect to compensate the sponsor according to the provisions of this section only if the program meets all of the following.

(A) The prospectus states that a primary investment objective of the program is to generate and to distribute to the participants the cash flow from the operation of the properties of the program.

(B) The anticipated life of the program does not exceed 20 years from the date the offering is declared effective by the SEC. However, the partnership agreement may provide that the program will be extended by the affirmative vote of a majority of the participants.

(C) The program will invest not less than 82% of the capital contributions as the investment in properties. The remaining capital contributions may be used to pay front-end fees. The total amount of front-end fees, whenever paid, shall be limited to the initial amount of capital contributions not applied to investment in properties. Of this investment in properties, not more than 3.0% of the capital contributions may be included as a working capital reserve.

(2) Computation. The annual asset based fee shall be 0.75% of the base amount. On capital contributions temporarily held while awaiting investments in properties, the asset based fee shall be 0.5% of those capital contributions. The sponsor may also be allowed the following additional fees and compensation:

(A) a property management fee as provided in subsection (g) of this section;

(B) real estate commissions as provided in subsection (f) of this section;

(C) a promotional interest as provided in subsection (e)(2)(B) of this section;

(D) fees for insurance services as allowed by subsection (h) of this section;

(E) front-end fees as provided in paragraph (1)(C) of this subsection;

(F) reimbursement for program expenses as provided in §117.5(e) of this title;

(G) fees, interest, and other charges as allowed in §117.5(i)(3) of this title;

(H) additional promotional interest in sale or refinancing proceeds as provided in subsection (c)(3)(A) of this section; and

(I) except as provided in subparagraphs (A) - (H) of this paragraph, the sponsor shall receive no fees or other compensation from the program.

(3) Limitations. An election to compensate the sponsor with an asset based fee as provided in this subsection shall be subject to the following limitations.

(A) The program may reinvest the proceeds from the sale and refinancing of its properties during the seven years following the date of its effectiveness with the SEC. No deduction for front-end fees shall be allowed on such reinvestments. Beginning on a date seven years after the date of effectiveness with the SEC, no reinvestment of the proceeds from the sale and refinancing of the properties of the program shall be allowed.

(B) The asset based fee may be accrued without interest when program funds are not available for its payment. Any accrued asset based fee may be paid from the next available cash flow or net proceeds from sale or refinancing of properties. No asset based fee may be paid from program reserves.

(C) A sponsor that is terminated and entitled to compensation from the program as provided in the partnership documents and governed by §117.2(f) of this title shall be paid the asset based fee through the date of such termination.

(D) Except as modified by this paragraph, all other portions of this statement of policy shall apply where appropriate to programs electing an asset based fee.

*§117.5. Conflicts of Interest and Investment Restrictions.*

(a) Sales, leases, and related program transactions.

(1) Sales and leases to program. A program shall not purchase or lease property in which a sponsor has an interest unless:

(A) the transaction occurs at the formation of the program and is fully disclosed in its prospectus or offering circular;

(B) the property is sold upon terms fair to the program and at a price not in excess of its appraised value; and

(C) the cost of the property and any improvements thereon to the sponsor is clearly established. If the sponsor's cost was less than the price to be paid by the program, the price to be paid by the program will not be deemed fair, regardless of the appraised value, unless some material change has occurred to the property which would increase the value since the sponsor acquired the property. Material factors may include the passage of a significant amount of time (but in no event less than two years prior to the offering of program interests), the assumption by the promoter of the risk of obtaining a rezoning of the property and its subsequent rezoning, or some other extraordinary event which in fact increases the value of the property. If the material factor includes development, construction, or major repairs or rehabilitation of the property by the sponsor less than two years prior to the offering of program interests, the costs shall be limited as required by subsection (j) of this section;

(D) the provisions of this subsection notwithstanding, the sponsor may purchase property in its own name (and assume loans in connection therewith) and temporarily hold title thereto for the purpose of facilitating the acquisition of such property, or the borrowing of money or obtaining of financing for the program, or completion of construction of the property, or any other purpose related to the business of the program, provided that such property is purchased by the program for a price no greater than the cost of such property to the sponsor, except compensation in accordance with §117.4 of this title, and subsection (j) of this section, and provided there is no difference in interest rates of the loans secured by the property at the time acquired by the sponsor and the time acquired by the program, nor any other benefit arising out of such transaction to the sponsor apart from compensation otherwise permitted by these guidelines. Accordingly, all income

generated and expenses associated with property so acquired shall be treated as belonging to the program. In no event shall the program purchase property from the sponsor pursuant to this subparagraph if the sponsor has held the property for a period in excess of 12 months prior to commencement of the offering. The sponsor shall not sell property to the program pursuant to this subparagraph if the cost of the property exceeds the funds reasonably anticipated to be available to the program to purchase the property. The prospectus and the program agreement shall set forth in a manner satisfactory to the Securities Commissioner the methodology to be utilized for determining which properties will ultimately be transferred to the program when the cost of the property acquired by the sponsor on behalf of the program exceeds program funds available to purchase the property;

(E) the purchase is made from a program formed by the sponsor pursuant to the rights of first refusal required by subsection (h) of this section. In such a case, the purchase price should be no more than fair market value as determined by an independent appraisal.

(2) Sales and leases to sponsor. A program shall not sell or lease property to the sponsor except as provided herein.

(A) The program may lease property to the sponsor pursuant to a lease-back arrangement made at the outset, the terms of which are fully disclosed in the prospectus and no less favorable to the program than those offered to and accepted by persons who are not affiliates of the sponsor.

(B) Not more than 10% of aggregate leaseable space owned by the program may be under lease to the sponsor pursuant to terms not less favorable to the program than those offered to and accepted by persons who are not affiliates of the sponsor; provided that the sponsor may not sublet such properties unless all profits derived from such subleases in excess of rentals due on the master lease are paid to the program.

(C) A sponsor may purchase property (or contract rights related thereto) from the program only if all of the following criteria are met:

*(i)* the program does not have sufficient offering proceeds available to retain the property (or contract rights related thereto);

*(ii)* the prospectus discloses that the sponsor will purchase all properties (or contract rights) that the program does not have sufficient proceeds to retain;

*(iii)* the sponsor pays the program an amount in cash equal to the cost of the property (or contract rights) to the program (including all cash payments and carrying costs related thereto);

*(iv)* the sponsor assumes all of the program's obligations and liabilities incurred in connection with the holding of the property (or contract rights) by the program;

*(v)* the sale to the sponsor occurs not later than 90 days following the termination date of the offering; and

*(vi)* the methodology to be used by the sponsor in determining which properties it will purchase in the event that the program's offering proceeds are insufficient to retain all properties must be fully disclosed in the prospectus.

(3) Dealing with related programs. A program shall not acquire property from a program in which the sponsor has an interest.

(b) Exchange of limited partnership interests. The program may not acquire property in exchange for limited partnership interests, except for property which is described in the prospectus which will be exchanged immediately upon effectiveness. In addition, such exchange shall meet the following conditions.

(1) A provision for such exchange must be set forth in the partnership agreement, and appropriate disclosure as to tax effects of such exchange are set forth in the prospectus.

(2) The property to be acquired must come within the objectives of the program.

(3) The purchase price assigned to the property shall be no higher than the value supported by an appraisal prepared by an independent qualified appraiser.

(4) Each limited partnership interest must be valued at no less than market value if there is a market or if there is no market, fair market value of the program's assets as determined by an independent appraiser within the last 90 days, less its liabilities, divided by the number of interests outstanding.

(5) No more than one-half of the interests issued by the program shall have been issued in exchange for property.

(6) No securities sales or underwriting commissions shall be paid in connection with such exchange.

(c) Exclusive agreement. A program shall not give a sponsor an exclusive right to sell or exclusive employment to sell property for the program.

(d) Commissions on reinvestment or distribution. A program shall not pay, directly or indirectly, a commission or fee (except as permitted under §117.4 of this title) to a sponsor in connection with the reinvestment or distribution of the proceeds of the resale, exchange, or refinancing of program property.

(e) Services rendered to the program by the sponsor.

(1) Expenses of the program.

(A) All expenses of the program shall be billed directly to and paid by the program. The sponsor may be reimbursed for the actual cost of goods and materials used for or by the program and obtained from entities unaffiliated with the sponsor. The sponsor may be reimbursed for the administrative services necessary to the prudent operation of the program provided that the reimbursement shall be at the lower of the sponsor's actual cost or the amount the program would be required to pay to independent parties for comparable administrative services in the same geographic location. No reimbursement shall be permitted for services for which the sponsor is entitled to compensation by way of a separate fee. Excluded from the allowable reimbursement (except as permitted under §117.4(c)(1) of this title) shall be:

*(i)* rent or depreciation, utilities, capital equipment, other administrative items; and

*(ii)* salaries, fringe benefits, travel expenses, and other administrative items incurred or allocated to any controlling persons of the sponsor or affiliates.

(B) Controlling person, for purpose of this section, includes, but is not limited to, any person, whatever their title, who performs functions for the sponsor similar to those of:

*(i)* chairman or member of the board of directors;

*(ii)* executive management, such as the:

*(I)* president;

*(II)* vice-president, or senior vice-president;

*(III)* corporate secretary; or

*(IV)* treasurer;

*(iii)* senior management, such as the vice-president of an operating division who reports directly to executive management; or

*(iv)* those holding 5.0% or more equity interest in the sponsor or a person having the power to direct or cause the direction of the sponsor, whether through the ownership of voting securities, by contract, or otherwise.

(C) The annual program report must contain a breakdown of the costs reimbursed to the sponsor. Within the scope of the annual audit of the sponsor's financial statement, the independent certified public accountants must verify the allocation of such costs to the program. The method of verification shall at minimum provide:

*(i)* a review of the time records of individual employees, the costs of whose services were reimbursed, and

*(ii)* a review of the specific nature of the work performed by each such employee.

(D) The methods of verification shall be in accordance with generally accepted auditing standards and shall accordingly include such tests of the accounting records and such other auditing procedures which the sponsor's independent certified public accountants consider appropriate in the circumstance. The additional costs of such verification will be itemized by said accountants on a program by program basis and may be reimbursed to the sponsor by the program in accordance with this subsection only to the extent that such reimbursement when added to the cost for administrative services rendered does not exceed the competitive rate for such services as determined in this paragraph.

(E) The prospectus must disclose in tabular form an estimate of such proposed expenses for the next fiscal year together with a breakdown by year of such expenses reimbursed in each of the last five public programs formed by the sponsor.

(2) Other goods and services. Except as provided in §117.4 of this title, paragraph (1) of this subsection, and subsection (j) of this section, other goods and services may be provided by the sponsor for the program only if all of the following criteria are met.

(A) The goods or services must be necessary to the prudent operation of the program.

(B) The compensation, price, or fee must be equal to either:

*(i)* the lesser of 90% of the compensation, price, or fee of any nonaffiliated person who is rendering comparable services or selling or leasing comparable goods on competitive terms in the same geographic location or 90% of the compensation, price, or fee charged by the sponsor for rendering comparable services or selling or leasing comparable goods on competitive terms; or

*(ii)* if at least 95% of gross revenues attributable to the business of rendering such services or selling or leasing such goods are derived from persons other than affiliates, the compensation, price, or fee charged by a non-affiliated person who is rendering comparable services or selling or leasing comparable goods on competitive terms in the same geographic location.

(C) The goods or services shall be provided pursuant to a written contract which precisely describes such goods or services and all compensation to be paid. The contract may be modified in any material respect only by the vote of a majority in interest of the limited partners and shall be terminable without penalty on 60 days' notice.

(D) The goods and services to be provided and the written contract referred to in subparagraph (C) of this paragraph must be fully disclosed in the prospectus.

(E) The sponsor must have been previously engaged in the business of rendering such services or selling or leasing such goods as an ordinary and ongoing business for a period of at least three years.

(F) The sponsor must receive at least 33% of gross revenues for such goods or services from persons other than affiliates.

(G) Except as provided in §117.4 of this title, paragraph (1) of this subsection, and subsection (j) of this section, and other than as provided in subparagraphs (B) and (D) - (F) of this paragraph, the sponsor may provide additional goods and services to the program if all of the following criteria are met:

*(i)* the goods or services may only be provided by the sponsor in extraordinary circumstances;

*(ii)* the compensation, price, or fee must be competitive with the compensation, price, or fee of any nonaffiliated person who is rendering comparable services or selling or leasing comparable goods on competitive terms which could reasonably be made available to the program;

*(iii)* the fees and other terms of the contract shall be fully disclosed;

*(iv)* the sponsor must be previously engaged in the business of rendering such services or selling or leasing such goods, independently of the program and as an ordinary and ongoing business; and

*(v)* there must be compliance with subparagraphs (A) and (C) of this paragraph.

(f) Rebates, kickbacks, and reciprocal arrangements.

(1) No rebates or give-ups may be received by the sponsor nor may the sponsor participate in any reciprocal business arrangements which would circumvent these rules. Furthermore the prospectus and program charter documents shall contain language prohibiting the rebates or give-ups as well as language prohibiting reciprocal business arrangements which would circumvent the restrictions against dealing with affiliates or promoters.

(2) No sponsor shall directly or indirectly pay or award any commissions or other compensation to any person engaged by a potential investor for investment advice as an inducement to such adviser to advise the purchaser of interests in a particular program; provided, however, that this clause shall not prohibit the normal sales commissions payable to a registered broker-dealer or other properly licensed person for selling program interests.

(g) Commingling of funds. The funds of a program shall not be commingled with the funds of any other person. Nothing contained in this subsection however, shall prohibit a sponsor from establishing a master fiduciary account pursuant to which separate subtrust accounts are established for the benefit of affiliated limited partnerships, provided, that program funds are protected from claims of such other partnerships and/or creditors. The prohibition of this subsection shall not apply to investments meeting the requirements of subsection (h) of this section.

(h) Investments in or with other programs.

(1) The program shall be permitted to invest in general partnerships or joint ventures with non-affiliates that own and operate one or more particular properties if the program, alone or together with any publicly registered affiliate of the program meeting the

requirements of paragraph (2) of this subsection acquires a controlling interest in such a general partnership or joint venture, but in no event shall duplicate fees be permitted. For purposes of this section, "controlling interest" means an equity interest possessing the power to direct or cause the direction of the management and policies of the general partnership or joint venture, including the authority to:

(A) review all contracts entered into by the general partnership or joint venture that will have a material effect on its business or property;

(B) cause a sale or refinancing of the property or its interest therein subject in certain cases where required by the partnership or joint venture agreement, to limits as to time, minimum amounts, and/or a right of first refusal by the joint venture partner or consent of the joint venture partner;

(C) approve budgets and major capital expenditures, subject to a stated minimum amount;

(D) veto any sale or refinancing of the property, or, alternatively, to receive a specified preference on sale or refinancing proceeds; and

(E) exercise a right of first refusal on any desired sale or refinancing by the joint venture partner of its interest in the property except for transfer to an affiliate of the joint venture partner.

(2) The program shall be permitted to invest in general partnerships or joint ventures with other publicly registered affiliates of the program if all of the following conditions are met.

(A) The programs have substantially identical investment objectives.

(B) There are no duplicate fees.

(C) The compensation to sponsors is substantially identical in each program.

(D) Each program must have a right of first refusal to buy if the other programs wish to sell property held in the joint venture.

(E) The investment of each program is on substantially the same terms and conditions.

(F) The prospectus must disclose the potential risk of impasse on joint venture decisions since no program controls and the potential risk that while a program may have the right to buy the property from the partnership or joint venture, it may not have the resources to do so.

(3) The program shall be permitted to invest in general partnerships or joint ventures with affiliates other than publicly registered affiliates of the program only under the following conditions:

(A) the investment is necessary to relieve the sponsor from any commitment to purchase a property entered into in compliance with subsection (a)(1)(D) of this section prior to the closing of the offering period of the program;

(B) there are no duplicate fees;

(C) the investment of each entity is on substantially the same terms and conditions;

(D) the program must have a right of first refusal to buy if the sponsor wishes to sell property held in the joint venture; and

(E) the prospectus discloses the potential risk of impasse on joint venture decisions.

(4) Other than as specifically permitted in paragraphs (2) and (3) of this subsection, the program shall not be permitted to invest in general partnerships or joint ventures with affiliates.

(5) A program shall be permitted to invest in general partnership interests of limited partnerships only if the program alone or together with any publicly registered affiliate of the program meeting the requirements of paragraph (2) of this subsection acquires a controlling interest as defined in paragraph (1) of this subsection, no duplicate fees are permitted, no additional compensation beyond that permitted by §117.4 of this title shall be paid to the sponsor, and the program agreement shall comply with this section.

(6) A program that is a limited partnership (the "upper-tier partnership") shall be permitted to invest in limited partnership interests of other limited partnerships (the "lower-tier partnerships") only if all of the following conditions are met.

(A) If the general partner of the lower-tier partnership is a sponsor of the upper-tier partnership, the program agreement of the upper-tier partnership shall:

*(i)* prohibit the program from investing in such lower-tier partnership unless the partnership agreement of the lower-tier partnership contains provisions complying with §117.9(f) of this title and provisions acknowledging privity between the lower-tier general partner and the participants; and

*(ii)* provide that compensation payable in the aggregate from both levels shall not exceed the amounts permitted under §117.4 of this title.

(B) If the general partner of the lower-tier partnership is not a sponsor of the upper-tier partnership, the program agreement of the upper-tier partnership shall prohibit the program from investing in the lower-tier partnership unless the partnership agreement of the lower-tier partnership contains provisions complying with §117.2(e) and (f) of this title; §117.7(a) - (d), (h), and (j) of this title; and §117.9(c) of this title; and shall provide that the compensation payable at both tiers shall not exceed the amounts permitted in §117.4 of this title.

(C) Each lower-tier partnership shall have as its limited partners only publicly registered upper-tier partnerships; provided, however, that special limited partners not affiliated with the sponsor shall be permitted if the interests taken result in no diminution in the control exercisable by the other limited partners.

(D) No program may be structured with more than two tiers.

(E) The program agreement of the upper-tier partnership must contain a prohibition against duplicate fees.

(F) The program agreement of the upper-tier partnership must provide that the limited partners of the upper-tier partnership can, upon the vote of a majority in interest and without the concurrence of the sponsor, direct the general partner of the upper-tier partnership (acting on behalf of the upper-tier partnership) to take any action permitted to a limited partner (e.g., the upper-tier partnership) in the lower-tier partnership.

(G) The prospectus must fully and prominently disclose the two-tiered arrangement and any risks related thereto.

(7) Notwithstanding paragraph (6)(B) - (G) of this subsection, if the general partner of the lower-tier partnership is not a sponsor of the upper-tier partnership, an upper-tier partnership may invest in a lower-tier partnership that owns and operates a particular property to be qualified pursuant to §42(g) of the Internal Revenue Code of 1986, as amended, if limited partners at both tiers are provided all of the rights

and obligations required by §117.7 of this title and the program agreement of the upper-tier partnership contains a prohibition against payment of duplicate fees.

(i) Lending practices.

(1) No loans may be made by the program to the sponsor or an affiliate, except as provided in paragraph (2) of this subsection and §117.2(d)(4) of this title.

(2) Programs which make or invest in mortgage loans may provide such loans to programs formed by or affiliated with the sponsor in those circumstances in which such activities have been fully justified to the Securities Commissioner. These affiliated transactions must at the minimum meet the following conditions:

(A) the circumstances under which the loans will be made and the actual terms of the loans must be fully disclosed in the prospectus; or

(B) an independent and qualified adviser must issue a letter of opinion to the effect that any proposed loan to an affiliate of the program is fair and at least as favorable to the program as a loan to an unaffiliated borrower in similar circumstances. In addition, the sponsors will be required to obtain a letter of opinion from the independent adviser in connection with any disposition, renegotiation, or other subsequent transaction involving loans made to a sponsor or an affiliate of the sponsor. The adviser's compensation must be paid by the sponsor and not reimbursable by the program.

(C) Loans made to third parties, the proceeds of which are used to purchase or refinance property in which the sponsor or an affiliate has an equity or security interest, must meet the requirements of subparagraph (A) or (B) of this paragraph.

(3) On loans made available to the program by the sponsor, the sponsor may not receive interest or similar charges or fees in excess of the amount which would be charged by unrelated lending institutions on comparable loans for the same purpose, in the same locality of the property if the loan is made in connection with a particular property. No prepayment charge or penalty shall be required by the sponsor on a loan to the program secured by either a first or a junior or all-inclusive trust deed, mortgage, or encumbrance on the property, except to the extent that such prepayment charge or penalty is attributable to the underlying encumbrance.

(4) The sponsor shall be prohibited from providing financing except:

(A) as permitted by paragraph (2) of this subsection, in which case there will be independent advisers for each publicly registered party to the transaction; or

(B) as permitted by paragraph (5) of this subsection.

(5) An "all-inclusive" or "wrap-around" note and deed of trust (the "all-inclusive note" herein) may be used to finance the purchase of property by the program only if the following conditions are complied with:

(A) the sponsor under the all-inclusive note shall not receive interest on the amount of the underlying encumbrance included in the all-inclusive note in excess of that payable to the lender on that underlying encumbrance;

(B) the program shall receive credit on its obligation under the all-inclusive note for payments made directly on the underlying encumbrance; and

(C) a paying agent, ordinarily a bank, escrow company, or savings and loan, shall collect payments (other than any initial payment of prepaid interest or loan points not to be applied to the underlying encumbrance) on the all-inclusive note and make disbursements therefrom to the holder of the underlying encumbrance prior to making any disbursement to the holder of the all-inclusive note, subject to the requirements of subparagraph (A) of this paragraph, or, in the alternative, all payments on the all-inclusive and underlying note shall be made directly by the program.

(j) Development, construction, or major repairs or rehabilitation of properties. The sponsor will be permitted to develop, construct, or provide major repairs and rehabilitation for properties, or render any services in connection with such activities only if all of the following conditions are satisfied.

(1) The transactions occur upon the formation of the program and are for properties specified in the final prospectus.

(2) The specific terms of the contract(s) are ascertainable and fully disclosed in the final prospectus.

(3) The purchase price to be paid by the program is based upon a contract price fully disclosed in the final prospectus which in no event can exceed the lesser of appraised value as completed (assuming a market rate of occupancy) or the sum of the cost of the land and the cost of development, construction, or repairs and rehabilitation. For the purposes of this paragraph, the cost of development, construction, or repairs and rehabilitation includes the development fee, the construction fee, direct costs, the cost of construction site personnel, construction administration, legal fees, design costs, engineering costs, and construction site utilities. The costs of construction site personnel and construction administration shall be limited as required by subsection (e)(1)(A) and (B) of this section and shall not include reimbursement of costs of controlling persons as set forth in that subsection. In no event may any other overhead of the sponsor be charged to the program or included in the total costs paid. The appraisal shall be prepared in accordance with subsection (l) of this section.

(4) The Securities Commissioner may require demonstration that the fees and costs payable under paragraph (3) of this subsection are comparable to and competitive with amounts charged by third parties in the same geographic area. The total of the development fee and the construction fee paid in connection with such project shall not exceed 15% of the direct costs of the project. For the purposes of this limitation, direct costs shall not include construction site personnel or construction site utilities.

(5) Notwithstanding §117.4(c) of this title, the only front-end fees paid to the sponsor in connection with such project shall consist of organization and offering expenses, a development fee (if applicable), a construction fee, and a real estate commission in connection with the acquisition of the land from persons who are not affiliates of the general partner. The sponsor may not receive any other front-end fees. The foregoing fees and commissions plus any additional acquisition fees and acquisition expenses to unaffiliated persons (and any development fee and construction fee individually) must be comparable to and competitive with the fees paid to unaffiliated persons rendering comparable services in the same geographic location. The Securities Commissioner may require demonstration that such fees, commissions, and expenses are comparable and competitive.

(6) The sponsor must comply with subsection (k) of this section.

(7) Subcontractors who are affiliates of the general partner must meet the requirements of subsection (e)(2)(B) - (F) of this section.

(8) If the contract price equals the appraised value set forth in paragraph (3) of this subsection, the sponsor shall be responsible for the direct costs incurred to achieve the appraisal assumptions.

(9) The sponsor complies with subsection (e)(2)(C) - (F) of this section.

(10) Development fees and construction fees paid to persons not affiliated with the general partner may be included in investment in properties.

(k) Completion bond requirements.

(1) The completion of property acquired which is under construction shall be guaranteed at the price contracted by an adequate completion bond or other satisfactory arrangements.

(2) For purposes of this subsection, satisfactory arrangements include, but are not limited to, the following:

(A) a written guarantee of completion by a person, supported by financial statements demonstrating sufficient net worth or adequately collateralized by other real or personal properties or other persons guarantees; and

(B) a retention of a reasonable portion of the purchase consideration as a potential offset to such purchase consideration in the event the seller does not perform in accordance with the purchase and sale agreement.

(3) Other satisfactory arrangements to guarantee completion may be made, provided they are disclosed in the prospectus and the prior written approval of the Securities Commissioner has been obtained.

(l) Requirement for real property appraisal. All real property acquisitions must be supported by an appraisal prepared by a competent, independent appraiser. The appraisal shall be maintained in the sponsor's records for at least five years, and shall be available for inspection and duplication by any participant. The prospectus shall contain notice of this right.

(m) Mortgage loan programs. A program will not be permitted to invest in or make mortgage loans unless a real property appraisal is obtained as provided for in subsection (l) of this section for each mortgage loan and a mortgagee's or owner's title insurance policy or commitment as to the priority of a mortgage or the condition of title is obtained. Further, the sponsor of mortgage loan programs shall observe the following policies in connection with investing in or making mortgage loans.

(1) The program may not invest in or make mortgage loans on any one property which would exceed, in the aggregate, an amount equal to 20% of the capital contributions to be raised by the program.

(2) The program may not invest in or make mortgage loans to or from any one borrower which would exceed, in the aggregate, an amount greater than 20% of the capital contributions to be raised by the program.

(3) The program may not invest in or make mortgage loans on unimproved real property in an amount in excess of 25% of the capital contributions to be raised by the program.

(4) The program shall not invest in real estate contracts of sale otherwise known as land sale contracts unless such contracts of sale are in recordable form and are appropriately recorded in the chain of title.

(5) The program shall not make or invest in mortgage loans on any one property if the aggregate amount of all mortgage loans outstanding on the property, including the loans of the program, would exceed an amount equal to 85% of the appraised value of the property as determined by an independent appraisal unless substantial justification exists because of the presence of other underwriting criteria. For purposes of this paragraph, the "aggregate amount of all mortgage loans outstanding on the property, including the loans of the program," shall include all interest (excluding contingent participations in income and/or appreciation in value of the mortgaged property), the current payment of which may be deferred pursuant to the terms of such loans, to the extent that deferred interest on each loan exceeds 5.0% per annum of the principal balance of the loan.

(6) The program is permitted to borrow money to the extent necessary to prevent defaults under existing loans; when the program has taken over the operation of property and there is a need for additional capital; to pay organizational and/or offering expenses.

(n) Program indebtedness.

(1) Except as contained in paragraph (2) of this subsection, following the termination of the offering the total amount of indebtedness incurred by the program shall at no time exceed the sum of 85% of the aggregate purchase price of all properties which have not been refinanced, and 85% of the aggregate fair market value of all refinanced properties, as determined by the lender as of the date of refinancing.

(2) For programs which own properties financed by loans insured or guaranteed by the full faith and credit of the United States government, or of a state or local government, or by an agency or instrumentality of any of them, and/or loans received from any of the foregoing entities, the following requisites apply. Following the termination of the offering the total amount of indebtedness incurred by the program shall at no time exceed the sum of 100% of the aggregate purchase price of all properties which have not been refinanced, and 100% of the aggregate fair market value of all refinanced properties as determined by the lender as of the date of refinancing.

(3) For any program subject to the limitations of both paragraphs (1) and (2) of this subsection, the maximum percentage of indebtedness for the entire program shall be calculated as follows:

(A) divide the total value of properties as determined under paragraph (2) of this subsection by the total value of properties as determined under paragraphs (1) and (2) of this subsection;

(B) multiply the number 15 by the quotient of subparagraph (A) of this paragraph; and

(C) add the product from subparagraph (B) of this paragraph to the number 85.

(4) For purposes of this subsection only, "indebtedness" shall include the principal of any loan together with any interest that may be deferred pursuant to the terms of the loan agreement which exceeds 5.0% per annum of the principal balance of such indebtedness (excluding contingent participations in income and/or appreciation in the value of the program property); and shall exclude any indebtedness incurred by the program for necessary working capital.

(o) Appraisal and compensation.

(1) In connection with a proposed roll-up, an appraisal of all program assets shall be obtained from a competent, independent expert. If the appraisal will be included in a prospectus used to offer the securities of a roll-up entity, the appraisal shall be filed with the SEC and the states as an exhibit to the registration statement for the offering. Accordingly, an issuer using the appraisal shall be subject to liability for violation of the Securities Act of 1933, §11, and comparable provisions under state laws for any material misrepresentations or material omissions in the appraisal. Program assets shall be appraised on a consistent basis. The appraisal shall be based on an evaluation of all relevant information, and shall indicate the value of the program's assets as of a date immediately prior to the announcement of the proposed roll-up. The appraisal shall assume an orderly liquidation of the

program's assets over a 12-month period. The terms of the engagement of the independent expert shall clearly state that the engagement is for the benefit of the program and its participants. A summary of the independent appraisal, indicating all material assumptions underlying the appraisal, shall be included in a report to the participants in connection with a proposed roll-up.

(2) In connection with a proposed roll-up, the person sponsoring the roll-up shall offer to participants who vote "no" on the proposal the choice of:

(A) accepting the securities of the roll-up entity offered in the proposed roll-up; or

(B) one of the following:

*(i)* remaining as participants in the program and preserving their interests therein on the same terms and conditions as existed previously; or

*(ii)* receiving cash in an amount equal to the participants' pro-rata share of the appraised value of the net assets of the program.

(3) The program shall not participate in any proposed roll-up which would result in participants having democracy rights in the roll-up entity which are less than those provided for under §117.7(a) and (b) of this title. If the roll-up entity is a corporation, the voting rights of participants shall correspond to the voting rights provided for in these guidelines to the greatest extent possible.

(4) The program shall not participate in any proposed roll-up which includes provisions which would operate to materially impede or frustrate the accumulation of shares by any purchaser of the securities of the roll-up entity (except to the minimum extent necessary to preserve the tax status of the roll-up entity). The program shall not participate in any proposed roll-up which would limit the ability of a participant to exercise the voting rights of its securities of the roll-up entity on the basis of the number of program interests held by that participant.

(5) The program shall not participate in any proposed roll-up in which the participants' rights of access to the records of the roll-up entity will be less than those provided for under §117.7(d) of this title.

(6) The program shall not participate in any proposed roll-up in which any of the costs of the transaction would be borne by the program if the roll-up is not approved by the participants.

*§117.6. Non-specified Property Programs.*

(a) Minimum capitalization. A non-specified property program shall provide for minimum cash gross proceeds from the offering of not less than $1 million to be available for investment in properties.

(b) Experience of sponsor. For non-specified property programs, the sponsor or at least one of its principals must establish that he has had the equivalent of not less than five years experience in the real estate business in an executive capacity and two years experience in the management and acquisition of the type of properties to be acquired or otherwise must demonstrate to the satisfaction of the Securities Commissioner that he has sufficient knowledge and experience to acquire and manage the type of properties proposed to be acquired by the non-specified property program.

(c) Statement of investment objectives. A non-specified property program shall state types of properties in which it proposes to invest, such as first-user apartment projects, subsequent-user apartment projects, shopping centers, office buildings, unimproved land, etc., and the size and scope of such projects shall be consistent with the objectives of the program and the experience of the sponsors. As a minimum the following restrictions on investment objectives shall be observed.

(1) Unimproved or non-income producing property shall not be acquired except in amounts and upon terms which can be financed by the program's proceeds or from cash available for distribution from operations. Investments in such property shall not exceed 25% of the gross proceeds of the offering. Properties which are expected to produce income within a reasonable period of time shall not be considered non-income producing. For purposes of this subsection two years shall be deemed to be presumptively reasonable.

(2) Investments in junior trust deeds and other similar obligations shall be prohibited, except for junior trust deeds which arise from the sale of program properties.

(3) The manner in which acquisitions will be financed including the use of an all-inclusive note or wrap-around, and the leveraging to be employed shall all be fully set forth in the statement of investment objectives.

(4) The statement of investment objectives shall indicate whether the program will enter into joint venture arrangements and the projected extent thereof.

(5) The statement of investment objectives shall not include a quantitative estimate of the program's anticipated economic performance or anticipated return to investors (in the form of distributable funds or tax benefits). The presentation of a proposed level of economic performance or return to investors (in the form of distributable funds or tax benefits) in connection with a non-specified property program is prohibited by §117.8(c) of this title.

(d) Period of offering and expenditure of proceeds. Subject to compliance with applicable state securities laws and regulations, an offering of securities in a non-specified property program may extend for up to two years from the date of original effectiveness provided that the minimum amount of program interests necessary to satisfy the greater of the minimum capitalization requirements of subsection (a) of this section or the impound requirements set by the program is sold within one year of commencement of the offering. While the proceeds of an offering are awaiting investment in real property, the proceeds may be temporarily invested in short-term highly liquid investments where there is appropriate safety of principal, such as United States Treasury bonds or bills. Any proceeds of the offering of program interests not invested within the later of two years after commencement of the offering or one year after the termination of the offering, or, if allowed by the Securities Commissioner, six months from the last scheduled mandatory deferred payment date (except for necessary operating capital) shall be distributed pro rata to the participants as a return of capital so long as the adjusted investment in properties is in compliance with §117.4(c) of this title.

(e) Multiple programs. The method for the allocation of the acquisition of properties by two or more programs of the same sponsor seeking to acquire similar types of properties shall be reasonable. The method also shall be described in the prospectus.

*§117.7. Rights and Obligations of Participants.*

(a) Meetings. Meetings of the program may be called by the sponsor or the participants holding more than 10% of the then outstanding limited partnership interests, for any matters for which the participants may vote as set forth in the limited partnership agreement. Upon receipt of a written request either in person or by certified mail stating the purpose(s) of the meeting, the sponsor shall provide all participants, within 10 days after receipt of said request, written notice (either in person or by certified mail) of a meeting and the purpose of such meeting

to be held on a date not less than 15 nor more than 60 days after receipt of said request, at a time and place convenient to participants.

(b) Voting rights of limited partners.

(1) To the extent permitted by the law of the state of formation, the program agreement shall provide that a majority of the outstanding program interests may, without necessity for concurrence by the general partner, vote to:

(A) amend the program agreement;

(B) remove the general partner(s);

(C) elect a new general partner(s);

(D) approve or disapprove the sale of all or substantially all of the assets of the program except pursuant to a plan disclosed in the final prospectus; and

(E) dissolve the program.

(2) Without concurrence of a majority of the outstanding program interests, the general partner(s) may not:

(A) amend the program agreement except for amendments which do not adversely affect the rights of participants;

(B) voluntarily withdraw as a general partner unless such withdrawal would not affect the tax status of the program and would not materially adversely affect the participant;

(C) appoint a new general partner(s);

(D) sell all or substantially all of the program's assets other than in the ordinary course of the program's business;

(E) cause the merger or other reorganization of the program; or

(F) dissolve the program.

(3) Notwithstanding paragraph (2)(C) of this subsection, an additional general partner may be appointed without obtaining the consent of the participants if the addition of such person is necessary to preserve the tax status of the program, such person has no authority to manage or control the program under the program agreement, there is no change in the identity of persons who have authority to manage or control the program, and the admission of such person as an additional general partner does not materially adversely affect the participants.

(4) Any amendment to the program agreement which modifies the compensation or distributions to which a general partner is entitled or which affects the duties of a general partner may be conditioned upon the consent of the general partner.

(5) With respect to any program interests owned by the sponsor, the sponsor may not vote or consent on matters submitted to the participants regarding the removal of the sponsor or regarding any transaction between the program and the sponsor. In determining the existence of the requisite percentage in interest of program interests necessary to approve a matter on which the sponsor may not vote or consent, any program interests owned by the sponsor shall not be included.

(6) If the law of the state of formation provides that the program will dissolve upon termination of a general partner(s) unless the remaining general partner(s) continues the existence of the program, the program agreement shall obligate the remaining general partner(s) to continue the program's existence; and if there will be no remaining general partner(s), the termination of the last general partner shall not be effective for a period of at least 120 days during which time a majority of the outstanding program interests shall have the right to elect a general partner who shall agree to continue the existence of the program.

(7) The program agreement shall provide for a successor general partner where the only general partner of the program is an individual.

(c) Reports to holders of limited partnership interests. The partnership agreement shall provide that the sponsor shall cause to be prepared and distributed to the holder of program interests during each year the following reports.

(1) In the case of a program registered under the Securities Exchange Act of 1934, §12(g), within 60 days after the end of each quarter of the program, a report containing:

(A) a balance sheet, which may be unaudited;

(B) a statement of income for the quarter then ended, which may be unaudited;

(C) a statement of cash flows for the quarter then ended, which may be unaudited; and

(D) other pertinent information regarding the program and its activities during the quarter covered by the report.

(2) In the case of all programs, within 75 days after the end of each program's fiscal year, all information necessary for the preparation of the limited partners' federal income tax returns.

(3) In the case of all programs, within 120 days after the end of each program's fiscal year, an annual report containing:

(A) audited financial statements accompanied by an auditor's report which, for purposes of this subsection only, may contain a qualified, adverse, or disclaimer opinion or explanatory paragraph;

(B) a report of the activities of the program during the period covered by the report; and

(C) where forecasts have been provided to the holders of limited partnership interests, to the holders of limited partnership interests, a table comparing forecasts previously provided with the actual results during the period covered by the report.

(4) The report in paragraph (3) of this subsection shall set forth distributions to limited partners for the period covered thereby and shall separately identify distributions from:

(A) cash flow from operations during the period;

(B) cash flow from operations during a prior period which had been held as reserves;

(C) proceeds from disposition of property and investments;

(D) lease payments on net leases with builders and sellers; and

(E) reserves from the gross proceeds of the offering originally obtained from the limited partners.

(5) Where assessments have been made during any period covered by any report required by paragraphs (1) - (4) of this subsection, then such report shall contain a detailed statement of such assessments and the application of the proceeds derived from such assessments.

(6) Where program interests have been purchased on a mandatory deferred payment basis, on which there remains an unpaid balance during any period covered by any report required by paragraphs (1) - (4) of this subsection; then such report shall contain

a detailed statement of the status of all mandatory deferred payments, actions taken by the program in response to any defaults, and a discussion and analysis of the impact on capital requirements of the program.

(d) Access to records. Every participant shall at all times have access to the records of the program and may inspect and copy any of them. The limited partnership agreement, bylaws, or other program agreement shall include the following provisions regarding access to the list of participants.

(1) An alphabetical list of the names, addresses, and business telephone numbers of the participants of the program along with the number of program interests held by each of them (the "participant list") shall be maintained as a part of the books and records of the program and shall be available for inspection by any participant or its designated agent at the home office of the program upon the request of the participant.

(2) The participant list shall be updated at least quarterly to reflect changes in the information contained therein.

(3) A copy of the participant list shall be mailed to any participant requesting the participant list within 10 days of the request. The copy of the participant list shall be printed in alphabetical order, on white paper, and in a readily readable type size (in no event smaller than 10-point type). A reasonable charge for copy work may be charged by the program.

(4) The purposes for which a participant may request a copy of the participant list include, without limitation, matters relating to participants' voting rights under the program agreement, and the exercise of participants' rights under federal proxy laws.

(5) If the sponsor of the program neglects or refuses to exhibit, produce, or mail a copy of the participant list as requested, the sponsor shall be liable to any participant requesting the list for the costs, including attorneys' fees, incurred by that participant for compelling the production of the participant list, and for actual damages suffered by any participant by reason of such refusal or neglect. It shall be a defense that the actual purpose and reason for the requests for inspection or for a copy of the participant list is to secure such list of participants or other information for the purpose of selling such list or copies thereof, or of using the same for a commercial purpose other than in the interest of the applicant as a participant relative to the affairs of the program. The sponsor may require the participant requesting the participant list to represent that the list is not requested for a commercial purpose unrelated to the participant's interest in the program. The remedies provided hereunder to participants requesting copies of the participant list are in addition to, and shall not in any way limit, other remedies available to participants under federal law, or the laws of any state.

(e) Admission of participants. Admission of participants to the program shall be subject to the following.

(1) Upon the original sale of partnership units by the program, the purchasers should be admitted as limited partners not later than 15 days after the release from impound of the purchaser's funds to the program, and thereafter purchasers should be admitted into the program not later than the last day of the calendar month following the date their subscription was accepted by the program. Subscriptions shall be accepted or rejected by the program within 30 days of their receipt; if rejected, all funds should be returned to the subscriber within 10 business days.

(2) The program shall amend the certificates of limited partnership at least once each calendar quarter to effect the substitution of substituted participants, although the sponsor may elect to do so more frequently. In the case of assignments, where the assignee does not become a substituted limited partner, the program shall recognize the assignment not later than the last day of the calendar month following receipt of notice of assignment and required documentation.

(3) Except where deemed inappropriate by the Securities Commissioner, persons holding program interests by assignment from entities holding limited partnership interests in a program for the purpose of assigning all or a portion of such interests to persons investing in such program (hereinafter the "assignor") shall be expressly granted the same rights as if they were limited partners except as prohibited by applicable local law, including but not limited to, the rights enumerated under this section. The assignment agreement and prospectus shall provide that the assignor's management shall have fiduciary responsibility for the safekeeping and use of all funds and assets of the assignees, whether or not in the assignor management's possession or control, and that the management of the assignor shall not employ, or permit another to employ such funds or assets in any manner except for the exclusive benefit of the assignees. In addition, the agreement shall not permit the assignees to contract away the fiduciary duty owed to the assignees by the assignor's management under the common law of agency.

(f) Redemption of program interests. Ordinarily, the program and the sponsor may not be mandatorily obligated to redeem or repurchase any of its program interests, although the program and the sponsor may not be precluded from purchasing such outstanding interests if such purchase does not impair the capital or the operation of the program. Notwithstanding the foregoing, a real estate program may provide for mandatory redemption rights under the following necessitous circumstances:

(1) death or legal incapacity of the owner; or

(2) a substantial reduction in the owner's net worth or income provided that:

(A) the program has sufficient cash to make the purchase;

(B) the purchase will not be in violation of applicable legal requirements; and

(C) not more than 15% of the outstanding units are purchased in any year.

(3) Where the purchase price is not mutually agreed upon, the matter shall be submitted to arbitration.

(g) Transferability of program interests.

(1) Restrictions on assignment of program interests or on the substitution of a limited partner are generally disfavored and such restrictions will be allowed only if:

(A) they comply with the safe harbor provisions of Internal Revenue Service Notice 88-75 (or other safe harbors adopted by the Internal Revenue Service that protect against treatment as a publicly traded partnership); or

(B) they are intended to preserve the tax status of the partnership or the characterization or treatment of income or loss.

(2) In the case of paragraph (1)(B) of this subsection, any restriction must be affirmatively supported by an opinion of counsel.

(3) the program agreement shall require the sponsor to eliminate or modify any restriction on substitution or assignment at such time as the restriction is no longer necessary.

(h) Assessments and defaults.

(1) Assessments will not be allowed for non-specified programs. In the case of specified programs, assessments shall be permitted only when specific circumstances demonstrate a need. If the anticipated cash flow from property (after payment of debt service and all operating expenses) is not sufficient to pay taxes and/or special assessments imposed by governmental or quasi-government units, the program agreement may include a provision for assessability to meet such deficiencies. Assessability must be limited to the foregoing obligations, and all amounts derived from such assessments must be applied only to satisfaction of said obligations.

(2) In the event of a default in the payment of assessments by a participant, his interests shall not be subject to forfeiture, but may be subject to a reasonable penalty for failure to meet his commitment. Provided that the arrangements are fair, this may take the form of reducing his proportionate interest in the program, subordinating his interest to that of nondefaulting partners, a forced sale complying with applicable procedures for notice and sale, the lending of the amount necessary to meet his commitment by the other participants, or a fixing of the value of his interest by independent appraisal or other suitable formula with provision for a delayed payment to him for his interest not beyond a reasonable period, but a debt security issued for such interest should not have a claim prior to that of the other investors in the event of liquidation.

(i) Dividend reinvestment plans. A program may offer participants the opportunity to elect to have cash distributions reinvested in the program or subsequent programs if the following conditions are met.

(1) The program and subsequent programs in which the participants reinvest are registered or exempted under the state's blue sky laws.

(2) Counsel for the program submits an opinion that the pooling of the funds for reinvestment is not in itself a security.

(3) The subsequent program has substantially identical investment objectives as the original program.

(4) The participants are free to elect or revoke reinvestment within a reasonable time and such right is fully disclosed in the offering documents.

(5) Prior to each reinvestment the participants receive a current updated disclosure document which contains at a minimum the following information:

(A) the minimum investment amount;

(B) the type or source of proceeds (e.g. cash distributions from operations or the sale or disposition of properties) which may be reinvested; and

(C) the tax consequences of the reinvestment to the participants.

(6) Counsel for the program submits an opinion that different consideration paid on reinvestment is not in violation of the state law (the difference arises when one participant agrees to payment of commission to the broker-dealer and another participant does not agree to payment of commission).

(7) The broker-dealer or the issuer assumes responsibility for blue sky compliance and performance of due diligence responsibilities and has contacted the participants to ascertain whether the participants continue to meet the state's suitability standard for participation in each reinvestment.

(8) If a broker-dealer is involved it shall obtain in writing an agreement from the client by which the client agrees to the payment of compensation to the broker-dealer in connection with individual reinvestment.

(j) Special reports. Within 60 days after the end of each quarter during which there have been real property acquisitions, a "special report" (which may be part of the quarterly report) shall be sent to all participants until the proceeds of the offering are committed or returned to the investors. The report shall contain the following information:

(1) the location and a description of the general character of all materially important real properties acquired or presently intended to be acquired by or leased to the program, during the quarter;

(2) the present or proposed use of such properties and their suitability and adequacy for such use;

(3) the terms of any material lease affecting the property;

(4) the proposed method of financing, including estimated down payment, leverage ratio, prepaid interest, balloon payment(s), prepayment penalties, due-on-sale or encumbrance clauses and possible adverse effects thereof and similar details of the proposed financing plan; and

(5) a statement that title insurance and any required construction, permanent or other financing and performance bonds or other assurances with respect to builders have been or will be obtained on all properties acquired.

(k) Arbitration of disputes. Except as permitted in §117.2(f) of this title, no provision requiring the mandatory arbitration of disputes between the participant and the sponsor or the program is permitted. Nothing contained in this chapter shall apply to preexisting contracts between broker-dealers and participants.

*§117.8. Disclosure and Marketing Requirements.*

(a) Sales promotional efforts.

(1) Sales literature, sales presentations (including prepared presentations to prospective investors at group meetings), and advertising used in the offer or sale of partnership interests shall conform in all applicable respects to requirements of filing, disclosure, and adequacy currently imposed on sales literature, sales presentations, and advertising used in the sale of corporate securities.

(2) All advertisements of and oral or written invitations to "seminars" or other group meetings at which program interests are to be described, offered, or sold shall clearly indicate that the purpose of such meeting is to offer such program interests for sale, the minimum purchase price thereof, and the name of the sponsor, underwriter, or selling agent. No cash, merchandise, or other item of value shall be offered as an inducement to any prospective participants to attend any such meeting. In connection with the offer or sale of program interests, no general offer shall be made of "free" or "bargain price" trips to visit property in which the program or proposed program has invested or intends to invest.

(3) All written or prepared audiovisual presentations (including scripts prepared in advance for oral presentations) to be made at such meetings must be submitted in advance to the Securities Commissioner not less than three business days prior to the first use thereof. This subsection shall not apply to meetings consisting only of representatives of securities broker-dealers.

(b) Contents of prospectus. The prospectus shall meet the requirements of Guide 5 of the Securities and Exchange Commission. The use of proceeds tabular summary required by Guide 5 shall include a separate line item for estimated acquisition expenses to be incurred

by the program. All of the information required to be set forth in the use of proceeds tabular summary by Guide 5 shall also be provided for estimated acquisition expenses, including an estimate of acquisition expenses to be paid to the sponsor. The description of the method for the allocation of the acquisition of properties by two or more programs of the same sponsor shall meet the requirements of §117.6(e) of this title. The prospectus shall contain a full description of the terms, consequences, risks to investors, and the program of any mandatory deferred payments. The Securities Commissioner may require additional disclosure if, in the Securities Commissioner's opinion, specific facts concerning the offering require it.

(c) Forecasts.

(1) The presentation of predicted future results of operations of real estate programs shall be permitted but not required for specified property programs investing primarily in improved property and shall be prohibited for non-specified property programs or specified property programs investing primarily in unimproved land. The covers of the prospectus must contain in bold face language one of the following statements.

(A) For specified property programs: "FORECASTS ARE CONTAINED IN THIS PROSPECTUS (OFFERING CIRCULAR). ANY PREDICTIONS AND REPRESENTATIONS, WRITTEN OR ORAL, WHICH DO NOT CONFORM TO THOSE CONTAINED IN THE PROSPECTUS (OFFERING CIRCULAR) SHALL NOT BE PERMITTED."

(B) For non-specified property and unimproved land programs: "THE USE OF FORECASTS IN THIS OFFERING IS PROHIBITED. ANY REPRESENTATIONS TO THE CONTRARY AND ANY PREDICTIONS, WRITTEN OR ORAL, AS TO THE AMOUNT OR CERTAINTY OF ANY PRESENT OR FUTURE CASH BENEFIT OR TAX CONSEQUENCE WHICH MAY FLOW FROM AN INVESTMENT IN THIS PROGRAM IS NOT PERMITTED."

(2) Forecasts for specified property programs shall be included in the prospectus or sales material of the program only if they comply with the following requirements.

(A) General. Forecasts shall be realistic in their predictions and shall clearly identify the assumptions made with respect to all material features of the presentation. Forecasts shall be examined by an independent certified public accountant in accordance with the Statement on Standards for Accountants' Services on Prospective Financial Information and the Guide for Prospective Financial Statements, as promulgated by the American Institute of Certified Public Accountants. The accountant's examination report shall be included in the prospectus. No forecasts shall be permitted in any sales literature which does not appear in the prospectus. If any forecasts are included in the sales literature, all forecasts must be presented.

(B) Material information. Forecasts shall include all the following information:

*(i)* annual predicted revenue by source; including the occupancy rate used in predicting rental revenue;

*(ii)* annual predicted expenses;

*(iii)* mortgage obligation--annual payments for principal and interest, points and financing fees, shown as dollars, not percentages;

*(iv)* the required occupancy rate in order to meet debt service and all expenses;

*(v)* predicted annual cash flow; stating assumed occupancy rate;

*(vi)* predicted annual depreciation and amortization with full description of methods to be used;

*(vii)* predicted annual taxable income or loss and a simplified explanation of the tax treatment of such results; assumed tax brackets may not be used;

*(viii)* predicted construction costs--including disclosure regarding contracts; and

*(ix)* accounting policies--e.g., with respect to points, financing costs, and depreciation.

(C) Presentation.

*(i)* Forecasts shall prominently display a statement to the effect that they represent a mere prediction of future events based on assumptions which may or may not occur and may not be relied upon to indicate the actual results which will be obtained.

*(ii)* Explanatory notes describing assumptions made and referring to risk factors should be integrated with tabular and numerical information.

*(iii)* When a sale-leaseback is employed, the statement that the seller is assuming the operating risk and consequently may have charged a higher price for the property must be included.

(D) Additional disclosures and limitations.

*(i)* Forecasts shall be for a period at least equivalent to the anticipated holding period for the property, or 10 years, whichever is shorter, and project a resale occurrence, including depreciation recapture, if applicable. The forecasted resale price must be reasonable.

*(ii)* Adequate disclosure shall be made of the changing economic effects upon the limited partners resulting principally from federal income tax consequences over the life of the partnership property, e.g., substantial tax losses in early years followed by an increasing amount of taxable income in later years.

*(iii)* Forecasts shall disclose all possible undesirable tax consequences of an early sale of the program property (such as, depreciation recapture or the failure to sell the property at a price which would return sufficient cash to meet resulting tax liabilities of the participants).

*(iv)* In computing the return to investors, no appreciation, so-called "equity buildup," or any other benefits from unrealized gains or value shall be shown or included.

(3) Forecasts shall not be allowed for unimproved land. Instead, a table of deferred payments specifying the various holding costs, i.e., interest, taxes, and insurance shall be inserted. However, where the program intends to develop and sell the land as its primary business, a detailed cash flow statement showing the timing of expenditures and anticipated revenues shall be required. Additionally, the consequences of a delayed selling program shall be shown.

(4) The prospectus and sales material shall not include a quantitative estimate of a program's anticipated economic performance or anticipated return to participants (in the form of distributable funds or tax benefits), except as permitted under this subsection.

*§117.9. Miscellaneous Provisions.*

(a) Deferred payments. Deferred payments or similar arrangements on account of the purchase price of program interests shall not be allowed except as follows.

(1) Mandatory deferred payments may be allowed in the case of specified property programs to the extent such payments bear a reasonable and demonstrable relationship to the capital needs and objectives of the program as described in the presentation of the business development plan in the investor disclosure document, but in any event such arrangements shall be subject to the following conditions.

(A) A minimum of 50% of the purchase price of the program interests must be paid by the investor at the time of sale, with the remainder to be paid within three years of the earlier of the completion of the offering or one year following the effective date of the offering or such shorter period as the Securities Commissioner, under the circumstances, deems appropriate.

(B) Mandatory deferred payments shall be evidenced by a promissory note of the investor. Such notes shall be with recourse, shall not be negotiable, and shall be assignable only subject to defenses of the maker. Such notes shall not contain a provision authorizing a confession of judgment. In any event, the notes shall provide for venue in the jurisdiction of the investor.

(C) The program shall not sell or assign the mandatory deferred payment notes at a discount.

(D) Selling commissions for program interests sold on a mandatory deferred payment basis are payable pro rata only from cash payments made by the participant.

(E) In the event of default in the payment of mandatory deferred payments by a participant, the participant's interest may be subject to a reasonable reduction as set forth in the prospectus and acceptable to the Securities Commissioner. Responses to defaults should be designed to protect the capital requirements of the program and the best interests of the non-defaulting participants while being fair to the defaulting participant.

(F) The program may take a security interest in the participant's program interests in the amount of the unpaid portion of the note provided that proceedings to enforce the security interest may not be commenced earlier than 30 days after default and notice of intent to foreclose on the security interest. Security interests on program interests that have been fully paid up shall be dissolved promptly.

(G) Unless mandatory deferred payments are guaranteed by the sponsor or by a surety bond or other arrangement satisfactory to the Securities Commissioner at the start of the offering, the sponsor shall not be allowed to purchase program interests recovered as a result of default in mandatory deferred payments unless, after recovery, such program interests have first been offered to the non-defaulting participants.

(H) Any certificates evidencing program interests purchased on a mandatory deferred payment basis shall so indicate.

(I) Upon receipt of any request to assign or transfer program interests purchased on mandatory deferred payment basis and having an unpaid balance, the sponsor, before the assignment or transfer, at its own cost, shall notify the proposed assignee/transferee of the material terms of the mandatory deferred payment obligation, including the schedule of payments, the status of payments, the status of any encumbrance held by the program on the program interest; the terms of default, the consequences thereof, and the terms of curing the default. In lieu of such notification the sponsor may accept a written statement containing such information and signed by the assignee/transferee.

(J) A default would be the failure to make a scheduled payment on the mandatory deferred payment obligation note before 30 days after its due date. A participant shall be allowed to cure a default and avoid any reduction in his interest in the program if within a minimum of 30 days from default and notice thereof the participant makes the delinquent payment with interest at the rate set forth in the prospectus for the curing of defaulted payments.

(2) Mandatory deferred payments shall not be allowed in the case of non-specified property programs except where the sponsor is able to satisfy the Securities Commissioner that the mandatory deferred payments bear a reasonable and demonstrable relationship to the capital needs and objectives of the program as described in the business development plan in the investor disclosure document. In any event, such arrangements shall be subject to the following conditions.

(A) A minimum of 50% of the purchase price of the program interests must be paid by the investor at the time of sale, with the remainder to be paid within two years of the earlier of the completion of the offering or one year following the effective date of the offering or such shorter period as the Securities Commissioner, under the circumstances, deems appropriate.

(B) The program shall otherwise comply with the provisions of this paragraph and paragraphs (1)(B) - (J), (2), and (3) of this subsection.

(3) Warrants or options (or their equivalents) to purchase program interests will be allowed only at the discretion of the Securities Commissioner but, in any event, must be identified as such and be accompanied with a clear statement of their nature and effect. Program interests acquired by their exercise may not differ from the stated terms of program interests otherwise acquired. Any penalty for non-exercise will ordinarily be viewed with disfavor.

(b) Reserves. Provision should be made for adequate reserves in the future by retention of a reasonable percentage of proceeds from the offering and regular receipts for normal repairs, replacements, and contingencies. Normally, not less than 3.0% of the offering proceeds will be considered adequate. However, in programs that invest in or make mortgage loans, reserves in an amount greater than 1.0% of the offering proceeds will be considered adequate.

(c) Reinvestment. Reinvestment of cash flow (excluding proceeds resulting from a disposition or refinancing of property) shall not be allowed. The partnership agreement and the prospectus shall set forth that reinvestment of proceeds resulting from a disposition or refinancing will not take place unless sufficient cash will be distributed to pay any state or federal income tax (assuming investors are in a specified tax bracket) created by the disposition or refinancing of property. Such a prohibition must be contained in the prospectus.

(d) Financial information required on application. In any offering of interests by a program, the program shall provide as an exhibit to the application the following financial information.

(1) Financial statements of program. The prospectus shall include audited financial statements of the program for each of the last three fiscal years (or for the life of the program, if less), provided that the only audited balance sheet that shall be required shall be as of the end of the most recent fiscal year of the program. When a program has operated less than one fiscal year, audited financial statements are not required unless requested by the Securities Commissioner.

(2) Balance sheet of corporate sponsor. Audited financial statements consisting only of an audited balance sheet for each corporate sponsor as of the end of the sponsor's most recent fiscal year shall be included in the prospectus.

(3) Other sponsors. A balance sheet for each noncorporate sponsor (including individual partners or individual joint ventures of a sponsor) as of a date not more than 135 days prior to the date of filing the application shall be submitted. Such balance sheet shall be

prepared in accordance with generally accepted accounting principles and reviewed and reported upon by an independent certified public accountant under the review standards set forth by the American Institute of Certified Public Accountants, and shall be signed and sworn to by such sponsor. A representation of the amount of such net worth must be included in the prospectus, or in the alternative, a representation that such sponsor meets the net worth requirements of §117.2(b) of this title shall be so included.

(4) Interim financial information. Where an audited balance sheet required by this subsection is as of a date more than 90 days prior to the date of filing, an unaudited balance sheet as of a date not more than 90 days prior to the date of filing shall also be provided. Where the application is made in coordination with a registration statement submitted to the Securities and Exchange Commission pursuant to the Securities Act of 1933, an interim unaudited balance sheet as of a date not more than 135 days prior to the date of filing shall be provided only if the audited balance sheet is as of a date more than 134 days prior to the date of filing. Interim unaudited statements of income, partners' equity, and cash flows shall also be provided with the unaudited balance sheet in instances where such statements are required by this subsection as part of the audited financial statements for the last fiscal year. The Securities Commissioner may require the interim unaudited information to be included in the prospectus when the audited information required by this section must be included.

(5) Filing of other statements. The Securities Commissioner may permit the omission of one or more of the statements required under this subsection and the filing (in substitution thereof) of appropriate statements verifying financial information having comparable relevance to an investor in determining whether to invest in the program. Such substitution will only be allowed where the Securities Commissioner finds this would be consistent with the protection of investors.

(e) Opinions of counsel.

(1) The application for qualification and registration shall contain a favorable ruling from the Internal Revenue Service or an opinion of independent counsel to the effect that the issuer will be taxed as a "partnership" and not as an "association" for federal income tax purposes. An opinion of counsel shall be in form and substance satisfactory to the Securities Commissioner, and shall be unqualified except to the extent permitted by the Securities Commissioner. However, an opinion of counsel may be based on reasonable assumptions, such as:

(A) facts or proposed operations as set forth in the offering circular or prospectus and organizational documents;

(B) the absence of future changes in applicable laws;

(C) the securities offered are paid for;

(D) compliance with certain procedures such as the execution and delivery of certain documents and the filing of a certificate of limited partnership or an amended certificate; and

(E) the continued maintenance of or compliance with certain financial, ownership, or other requirements by the issuer or sponsor.

(2) The Securities Commissioner may request from counsel as supplemental information such supporting legal memoranda and an analysis as he shall deem appropriate under the circumstances.

(3) To the extent the opinion of counsel or Internal Revenue Service ruling is based on the maintenance of or compliance with certain requirements or conditions by the issuer or sponsor, the offering circular or prospectus shall contain representations that such requirements or conditions will be met and the partnership agreement shall, to the extent practicable, contain provisions requiring such compliance.

(4) There shall be included also an opinion of independent counsel to the effect that the securities being offered are duly authorized or created and validly issued interests in the issuer, and that the liability of the public investors will be limited to their respective total agreed upon investment in the issuer.

(5) The Securities Commissioner may request an opinion of counsel concerning tax aspects when this appears necessary for the protection of investors.

(f) Provisions of partnership agreement. The requirements and/or provisions of appropriate portions of the following sections shall be included in the partnership agreement: §117.1(b) of this title; §117.2(c) - (f) of this title; §117.4(c) - (i) of this title; §117.5(a) - (i) and (k) - (n) of this title; §117.6(c) and (d) of this title; §117.7(a) - (f), (h), (j), and (k) of this title; and subsection (a) - (c) of this section.

(g) General instructions--real estate guidelines.

(1) The cross reference sheet on Form 133.31 should be completed with the application for registration.

(2) Sections which are not applicable should be noted as such.

(3) Provisions of the program which vary from the guidelines must be explained by footnote; for example, if the program uses a defined term which is different from the guidelines definition, the variance must be explained. Footnotes should be numbered sequentially in the column designated footnotes and should be presented on a rider identified as footnotes with each footnote on the rider numerically corresponding to the footnote identified on the cross reference sheet.

(4) A section is provided at the bottom of each page of the cross reference sheet for additional or supplemental cross references. Lines are provided in the event additional cross references are needed with respect to subsections of the guidelines not specifically identified on the top of the page, or in the event there were insufficient lines to present all relevant cross references with respect to an item appearing on that page.

(5) The last page of the cross reference sheet should be executed by preparer.

(6) These general instructions should be removed before filing with the Securities Commissioner.

(h) Amendments and supplements. A redlined copy of all amendments and supplements to an application shall be filed with the Securities Commissioner as soon as the amendment or supplement is available.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200801006
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 305-8303

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## CHAPTER 133. FORMS

**7 TAC §133.31**

*(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the State Securities Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Texas State Securities Board proposes the repeal of §133.31, a form concerning the real estate guidelines cross reference sheet. The proposed repeal of the existing form will allow for the simultaneous adoption of a new form, which is being concurrently proposed.

Micheal Northcutt, Director, Registration Division, has determined that, for the first five-year period the repeal is in effect, there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Northcutt also has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be the elimination of an outdated form. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed repeal in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The repeal is proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposed repeal affects Texas Civil Statutes, Article 581-7.

*§133.31. Real Estate Guidelines Cross Reference Sheet.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200801003
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 305-8303

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**7 TAC §133.31**

The Texas State Securities Board proposes new §133.31, a form concerning the real estate guidelines cross reference sheet. The proposed new section adopts by reference a form that would incorporate changes to the existing form recently adopted by the North American Securities Administrators Association, Inc. (NASAA).

Micheal Northcutt, Director, Registration Division, has determined that, for the first five-year period the rule is in effect, there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Northcutt also has determined that, for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be that an updated form, developed in coordination with securities regulators in other jurisdictions, will be used in reviewing and processing applications for the registration of real estate programs. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8310.

The new rule is proposed under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposed new rule affects Texas Civil Statutes, Article 581-7.

*§133.31. Real Estate Guidelines Cross Reference Sheet.*

The State Securities Board adopts by reference the real estate guidelines cross reference sheet form. This form is available from the State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 19, 2008.

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Denise Voigt Crawford
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8303

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# TITLE 13. CULTURAL RESOURCES

## PART 3. TEXAS COMMISSION ON THE ARTS

## CHAPTER 31. AGENCY PROCEDURES

**13 TAC §31.5, §31.11**

The Texas Commission on the Arts proposes amendments to §31.5, concerning Staff, and §31.11, concerning Gifts, Grants, and Donations. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously adopts amendments to §31.5 and §31.11 on an emergency basis.

The purpose of the amendment to §31.5 is to address issues related to employees of the Commission. The change to the rule removes references to procedures related to the Texas Cultural Endowment Fund. Issues related to the Texas Cultural Endowment Fund are addressed in the Texas Government Code §444.026 and in the Commission's Investment Policy and Gift Acceptance Policy.

Section 31.11(c)(5) does not accurately reflect the work of the Commission. The Commission does accept restricted gifts intended for the sole benefit of a single organization. Therefore the rule is being amended.

Gary Gibbs, Executive Director, Texas Commission on the Arts, has determined that, for the first five-year period the amendments are in effect, there will be no fiscal implications for state or local government as a result of enforcing the amendments.

Mr. Gibbs also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be updated rules. There is no anticipated economic cost to persons who are required to comply with the amendments as proposed. There will be no effect to small or micro businesses.

Comments on the proposal may be submitted to Jim Bob McMillan, Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711-3406. Comments will be accepted for 30 days after publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

No other statutes, articles or codes are affected by the amendments.

*§31.5. Staff.*

(a) Within the policies and guidelines established by the commission, the executive director shall have the responsibility to develop programs, employ staff, and to carry out operations. The executive director shall be an ex officio member of all commission committees except the Officer Nominating Committee. [~~Prior to making a transfer or withdrawal of funds from any Cultural Trust Endowment Fund Account, authorized officials of the Texas Commission on the Arts must obtain director approval, which can be obtained by fax, from the Commission's chairman or the Commission's treasurer. All such actions must not be inconsistent with approved investment policy. Any funds received must be deposited in the Cultural Trust Endowment Fund account within three business days. Authorized officials are the Executive Director, the Deputy Director and the Director of Finance and Administration of the Texas Commission on the Arts.~~]

(b) - (c) (No change.)

*§31.11. Gifts, Grants, and Donations.*

(a) - (b) (No change.)

(c) Restricted Gifts.

(1) - (4) (No change.)

[~~(5) The Commission will not accept restricted gifts intended for the sole benefit of a single organization.~~]

(5) [~~(6)~~] Any organization receiving a grant/contract as a result of a restricted gift must provide evidence of sound administrative and fiscal management practices, comply with the Commission's general eligibility rules and guidelines, and meet the requirements of the restrictions placed on the gift by the donor.

(6) [~~(7)~~] Any organization receiving a grant/contract as a result of a restricted donation must provide acknowledgment of receipt of the gift from the donor and the Commission as appropriate.

(d) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200801015
Gary Gibbs
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 936-6564

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## CHAPTER 32. MEMORANDA OF UNDERSTANDING

The Texas Commission on the Arts (TCA) proposes the repeal and replacement of §32.1, concerning Memoranda of Understanding. Elsewhere in this issue of the *Texas Register*, the Texas Commission on the Arts contemporaneously adopts the repeal and replacement of §32.1 on an emergency basis.

Section 32.1 does not address all of the Memorandum of Understanding (MOU) agreements TCA is currently required to have in place and does not address the issue of future MOU agreements. This repeal and replacement will remedy both of those issues.

Gary Gibbs, Executive Director, Texas Commission on the Arts, has determined that, for the first five-year period the repeal and new section are in effect, there will be no fiscal implications for state or local government as a result of enforcing the proposal.

Mr. Gibbs also has determined that, for each year of the first five years the repeal and new section are in effect, the public benefit anticipated as a result of enforcing the proposal will be efficient governance. There is no anticipated economic cost to persons who are required to comply with the repeal and new section as proposed. There will be no effect to small or micro businesses.

Comments on the proposal may be submitted to Jim Bob McMillan, Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711-3406. Comments will be accepted for 30 days after publication of the proposal in the *Texas Register*.

**13 TAC §32.1**

*(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Commission on the Arts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The repeal is proposed under the Texas Government Code, §444.009, which provides the Texas Commission on the Arts

with the authority to make rules and regulations for its government and that of its officers and committees.

No other statutes, articles or codes are affected by the repeal.

*§32.1. Memorandum of Understanding with the Texas Department of Economic Development, the Texas Department of Transportation, the Texas Parks and Wildlife Department, the Texas Commission on the Arts, and the Texas Historical Commission.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200801016
Gary Gibbs
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 936-6564

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**13 TAC §32.1**

The new section is proposed under the Texas Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

No other statutes, articles or codes are affected by the new section.

*§32.1. Memoranda of Understanding.*

(a) The Texas Commission on the Arts (TCA) shall enter into Memorandum of Understanding (MOU) agreements as outlined in §444.030 of the Texas Government Code.

(b) TCA may enter into additional MOU agreements with other state agencies and/or partners. MOU agreements may result from Legislation or be initiated by the Commission for the purpose of furthering the agency's mission and goals.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200801017
Gary Gibbs
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 936-6564

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## CHAPTER 35. A GUIDE TO OPERATIONS, PROGRAMS AND SERVICES

**13 TAC §35.2**

The Texas Commission on the Arts (commission) proposes an amendment to §35.2, concerning A Guide to Programs and Services.

The purpose of the amendment is to update the Adoption by Reference material.

Gary Gibbs, Executive Director, Texas Commission on the Arts, has determined that, for the first five-year period the amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing the amendment as proposed.

Mr. Gibbs also has determined that, for each year of the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be an updated Guide. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed. There will be no effect to small or micro businesses.

Comments on the proposal may be submitted to Jim Bob McMillan, Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711-3406. Comments will be accepted for 30 days after publication in the *Texas Register*.

The amendment is proposed under the Texas Government Code, §444.009, which provides the Texas Commission on the Arts with the authority to make rules and regulations for its government and that of its officers and committees.

No other statutes, articles, or codes are affected by this proposal.

*§35.2. A Guide to Programs and Services.*

The commission adopts by reference A Guide to Programs and Services (revised February 2008 [~~October~~ ~~2007~~]). This document is published by and available from the Texas Commission on the Arts, P.O. Box 13406, Austin, Texas 78711. This document is also available online at www.arts.state.tx.us.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801125
Gary Gibbs
Executive Director
Texas Commission on the Arts
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 936-6564

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# TITLE 16. ECONOMIC REGULATION

## PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

## CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

## SUBCHAPTER C. INFRASTRUCTURE AND RELIABILITY

**16 TAC §25.55**

The Public Utility Commission of Texas (commission) proposes new §25.55, relating to Substation Reliability. The commission

proposes this new rule in an effort to implement recommendations made by Project Number 32182, *PUC Investigation of Methods to Improve Electric and Telecommunications Infrastructure to Minimize Long Term Outages and Restoration Costs Associated With Gulf Coast Hurricanes* ("Hurricane Infrastructure Report"). The proposed new rule will implement recommendations made in the Hurricane Infrastructure Report. Specifically, the new section will establish minimum requirements for the construction of electric transmission substation facilities above the 100-year floodplain and for providing emergency power at critical transmission substations to ensure the safe and reliable operation of the substation facilities during power outages and severe flooding. Project Number 34737 is assigned to this proceeding.

Brian Almon, Director, Transmission Analysis, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Almon has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be a more reliable electric infrastructure that will be more capable of responding to natural disasters. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section; therefore, no regulatory flexibility analysis is required. There may be economic costs to persons who are required to comply with the proposed section. These costs are associated with providing emergency power at critical transmission substations and the potential extra design and acquisition costs associated with ensuring transmission substation facilities are above the 100-year floodplain. Further, the costs associated with complying with this section are likely to vary from business to business and are difficult to ascertain. However, as explained in the Hurricane Infrastructure Report, it is believed that the benefits accrued from implementing the proposed section will outweigh the costs.

Mr. Almon has also determined that for each year of the first five years the proposed section is in effect there should be no adverse effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested, pursuant to the Administrative Procedure Act, Texas Government Code §2001.029 in Hearing Room Gee, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Thursday, May 1, 2008, at 9:30 a.m. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed new section may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Sixteen copies of comments to the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule(s). The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 34737.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2007) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §14.001, which gives the commission the general power to regulate and supervise the business of each public utility; PURA §38.001, which provides that electric utilities and electric cooperatives shall furnish service that is safe, adequate, efficient, and reasonable; §38.002, which grants the commission authority to adopt rules relating to just and reasonable standards an electric utility must follow in furnishing service and rules relating to customer protection; and §38.071, which provides the commission with authority to order an electric utility to provide improvements in its service.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 38.001, 38.002, and 38.071.

*§25.55. Substation Reliability.*

(a) Purpose. The purpose of this section is to establish minimum requirements for the construction of new transmission substation facilities above the 100-year floodplain and for provision of emergency power equipment at critical transmission substations sufficient to ensure the safe and reliable operation of the substation facilities during station service power outages and severe flooding.

(b) Application. This section applies to all electric utilities as defined by the Public Utility Regulatory Act (PURA) §31.002(6) and all transmission and distribution utilities as defined by PURA §31.002(19). The term "utility" as used in this section shall mean an electric utility or a transmission and distribution utility.

(c) Definitions.

(1) Transmission substation--An electrical installation, or any portion of an electrical installation, containing one or more of the following:

(A) an electrically operated switching facility for one or more transmission lines;

(B) a load-serving transformer energized at 60 kilovolts or above.

(2) New transmission substation--A transmission substation whose construction commenced on or after the date the requirements of this section take effect.

(3) Critical transmission substation--A transmission substation that has been identified at the time it is designed as a "Critical Asset" or that contains facilities designated as "Critical Assets" using the framework for identification of critical assets incorporated in the approved North American Electric Reliability Corporation (NERC) reliability standards.

(d) Emergency power. Every two years after the initial determination or more frequently if required by NERC, each utility shall determine whether each of its energized transmission substations is a critical transmission substation. Further, each utility shall, at the time it is designing any new transmission substation, determine whether the energized substation will be identified as a critical transmission substation as defined in subsection (c)(3) of this section. For each transmission substation identified as critical, the utility shall ensure the normal operation of all transmission-related substation facilities for a period of 72 hours after loss of the sources of station service power to the substation.

(e) Construction above floodplain. For a new transmission substation that will be located in a 100-year floodplain, a utility shall

design and construct the substation so that the electrically energized portions of all substation transmission facilities shall be not less than one foot above the 100-year floodplain. The utility shall determine whether the location of the substation is in a 100-year floodplain using floodplain maps from the Federal Emergency Management Agency (FEMA). If FEMA maps are not available for the site of the substation, the utility shall use a Texas-registered Professional Engineer or a Professional Hydrologist as certified by the American Institute of Hydrology to determine the location of the floodplain.

(1) This subsection applies to an expansion of an existing transmission substation, except for a substation that has already undergone sufficient site preparation for the installation of such transmission facilities.

(2) This subsection shall not apply to transmission facilities that have been designed to operate underwater or underground.

(f) Effective date. This section takes effect on January 1, 2011.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801096
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 936-7223

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## SUBCHAPTER J. COSTS, RATES AND TARIFFS
## DIVISION 1. RETAIL RATES

### 16 TAC §25.237

The Public Utility Commission of Texas (commission) proposes an amendment to §25.237, relating to Fuel Factors. Current §25.237 allows utilities to petition for fuel factor modifications once every six months according to a fixed schedule and a prescribed filing package. The proposed amendment establishes the option, and procedure, for utilities to determine their fuel factors by using a commission-approved, utility-specific fuel factor formula. The proposed amendment allows utilities that use such a commission-approved, utility-specific fuel factor formula to request more frequent fuel factor modifications--as often as once every four months, except for the month of December, and not subject to a set schedule. The proposed amendment also establishes a procedure for the approval of the proposed fuel factors on an interim basis for utilities that use a commission-approved, utility-specific formula.

The proposed amendment is anticipated to facilitate a more timely recovery of fuel expenses, reduce the size of over- and under-recovery balances passed on to customers, and provide more accurate price signals to customers. The commission anticipates that, by utilizing an established, utility-specific fuel factor formula, issues that may occur in a prescribed filing package proceeding and that are likely to result in a hearing can be eliminated. Therefore, the option to utilize a commission-approved, utility-specific formula streamlines the administrative review process, limits the issues the commission may have to address in a proceeding and may result in timelier processing of fuel factor modification requests.

Procedurally, the proposed amendment also requires a utility to serve its complete petition package on each party in the utility's most recent fuel reconciliation and on the Office of Public Utility Counsel. Service shall be accomplished by email if possible. This will enable interested parties to begin review of the requested fuel factor revisions at an earlier time and will help to expedite such proceedings. Project Number 34914 is assigned to this proceeding.

Larry Reed, Infrastructure and Reliability Division, has determined that for each year of the first five-year period the proposed amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Reed has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the amendment will be that utilities will be able to more accurately reflect actual fuel expenses in their fuel factor and thereby reduce the over- and under-collections passed on to customers, in addition to providing customers with more accurate price signals. Additionally, the amendment will allow more expedited and efficient processing of fuel factor revisions, reducing regulatory burdens on all parties involved.

Mr. Reed has determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this amendment. Mr. Reed has also determined that there is no anticipated economic cost to persons who are required to comply with the amendment as proposed. Therefore, no regulatory flexibility analysis is necessary.

Mr. Reed has also determined that for each year of the first five years the proposed amendment is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested, pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Tuesday, April 29, 2008, at 10:00 a.m. A written request for a public hearing must be received within 31 days after publication.

Comments on the proposed amendment to §25.237 may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, not later than 31 days after publication. Sixteen copies of comments to the proposed amendment are required to be filed. Reply comments must be submitted not later than 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed amendment. All comments should refer to Project Number 34914.

The amendment to §25.237 is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supplement 2007) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and PURA §36.203, which authorizes the commission to adopt rules that provide for the timely adjustment of a utility's fuel factor.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §36.203.

*§25.237. Fuel Factors.*

(a) Use and calculation of fuel factors. An electric utility's fuel costs will be recovered from the electric utility's customers by the use of a fuel factor that will be charged for each kilowatt-hour (kWh) consumed by the customer.

(1) An electric utility may determine its fuel factor in dollars per kilowatt-hour pursuant to either subparagraph (A) or (B) of this paragraph. [~~Fuel factors are determined by dividing the electric utility's projected net eligible fuel expenses, as defined in §25.236(a) of this title (relating to Recovery of Fuel Costs), by the corresponding projected kilowatt-hour sales for the period in which the fuel factors are expected to be in effect.~~] Fuel factors must account for system losses and for the difference in line losses corresponding to the [~~type of~~] voltage at which the electric service is provided. An electric utility may have different fuel factors for different times of the year to account for seasonal variations. A different method of calculation may be allowed upon a showing of good cause by the electric utility.

(A) Fuel factors may be determined by dividing the electric utility's projected net eligible fuel expenses, as defined in §25.236(a) of this title (relating to Recovery of Fuel Costs), by the corresponding projected kilowatt-hour sales for the period in which the fuel factors are expected to be in effect.

(B) Fuel factors may be determined using a commission-approved, utility-specific fuel factor formula. Fuel factor formulas may be approved or revised only in a general rate change proceeding or a proceeding to consider an application to establish a fuel factor formula with notice and an opportunity for a hearing.

(2) An electric utility may initiate a change to its fuel factor as follows:

(A) Pursuant to subsection (a)(1)(A) of this section, an [~~An~~] electric utility may petition to adjust its fuel factor as often as once every six months according to the schedule set out in subsection (d) of this section.

(B) Pursuant to subsection (a)(1)(B) of this section, an electric utility may petition to adjust its fuel factor in accordance with its approved fuel factor formula no sooner than three months after the issuance of a final order approving its most recent fuel factor adjustment.

(C) [~~(B)~~] Notwithstanding subsection (a)(2)(A) of this section, an [~~An~~] electric utility may petition to change its fuel factor at times other than provided in the schedule if an emergency exists as described in subsection (f) of this section.

(D) [~~(C)~~] An electric utility's fuel factor may be changed in any general rate proceeding.

(3) Fuel factors are temporary rates, and the electric utility's collection of revenues by fuel factors is subject to the following adjustments:

(A) The reasonableness of the fuel costs that an electric utility has incurred will be periodically reviewed in a reconciliation proceeding, as described in §25.236 of this title, and any disallowed [~~unreasonable~~] costs resulting from a reconciliation proceeding [~~incurred~~] will be reflected in [~~refunded to~~] the calculation of the utility's recoverable fuel and over/(under) collections [~~electric utility's customers~~].

(B) To the extent that there are variations between the fuel costs incurred and the revenues collected, it may be necessary or convenient to refund overcollections or surcharge undercollections. Refunds or surcharges may be made without changing an electric utility's fuel factor. An electric utility may petition for a surcharge if[~~, but requests by the electric utility to make refunds or surcharges may only be made at the times allowed by this paragraph. An electric utility may petition to make refunds or surcharges at the specified times that these rules allow an electric utility to change its fuel factor irrespective of whether the electric utility actually petitions to change its fuel factor at that time. An electric utility shall petition for a surcharge at the next date allowed for setting a fuel factor by the schedule set out in subsection (d) of this section when~~] it has materially undercollected its fuel costs and projects that it will continue to be in a state of material undercollection. An electric utility shall petition to make a refund if [~~at any time that~~] it has materially overcollected its fuel costs and projects that it will continue to be in a state of material overcollection. "Materially" or "material," as used in this section, shall mean that the cumulative amount of over- or under-recovery, including interest, is greater than or equal to 4.0% of the annual actual [~~estimated~~] fuel cost figures on a rolling 12-month basis [~~figure most recently adopted by the commission~~], as reflected in the utility's monthly fuel cost reports as filed by the utility [~~shown by the electric utility's fuel filings~~] with the commission.

(b) Petitions to revise fuel factors.

(1) An electric utility using the fuel factor methodology set forth under subsection (a)(1)(A) of this section may file a petition requesting revised fuel factors pursuant to subsection (a)(2)(A) of this section during [~~During~~] the first five business days of the months specified in subsection (d) of this section[~~, each electric utility using one or more fuel factors may file a petition requesting revised fuel factors~~]. A copy of the complete petition package shall be served on each party in the utility's most recent fuel reconciliation and on [~~filing shall also be delivered to the Office of Regulatory Affairs and~~] the Office of Public Utility Counsel. Service shall be accomplished by email if possible. Each complete filing package shall include [~~petition must be accompanied by~~] the commission-prescribed [~~commission prescribed~~] fuel factor application, a tariff sheet reflecting the proposed fuel factors and supporting testimony that includes the following information:

(A) [~~(1)~~] For each month of the period in which the fuel-factor has been in effect and has not been reconciled up to the most recent month for which information is available,

*(i)* [~~(A)~~] the revenues collected pursuant to fuel factors by customer class;

*(ii)* [~~(B)~~] any other items that to the knowledge of the electric utility have affected fuel factor revenues and eligible fuel expenses; and

*(iii)* [~~(C)~~] the difference, by customer class, between the revenues collected pursuant to fuel factors and the eligible fuel expenses incurred.

(B) [~~(2)~~] For each month of the period for which the revised fuel factors are expected to be in effect, provide system energy input and sales, accompanied by the calculations underlying any differentiation of fuel factors to account for differences in line losses corresponding to the [~~type of~~] voltage at which the electric service is provided.

(2) An electric utility using the fuel factor formula methodology set forth under subsection (a)(1)(B) of this section may file a petition requesting revised fuel factors pursuant to subsection (a)(2)(B) of this section at least 15 days prior to the first billing cycle in the billing month in which the proposed fuel factors are requested to become effective. A copy of the complete petition package shall be served on

each party in the utility's most recent fuel reconciliation and on the Office of Public Utility Counsel. Service shall be accomplished by email if possible. Each complete filing package shall include:

(A) a tariff sheet reflecting the proposed fuel factors;

(B) workpapers supporting the calculation of the revised fuel factors;

(C) calculations underlying any differentiation of fuel factors to account for differences in line losses corresponding to the voltage at which the electric service is provided; and

(D) any computer generated documents must be provided in their native electronic format with all cells and internal formulas disclosed.

(c) Fuel factor revision proceeding. Burden of proof and scope of proceeding are as follows:

(1) In a proceeding to revise fuel factors pursuant to subsection (a)(1)(A) of this section, an electric utility has the burden of proving that:

(A) the expenses proposed to be recovered through the fuel factors are reasonable estimates of the electric utility's eligible fuel expenses during the period that the fuel factors are expected to be in effect;

(B) the electric utility's estimated monthly kilowatt-hour system sales and off-system sales are reasonable estimates for the period that the fuel factors are expected to be in effect; and

(C) the proposed fuel factors are reasonably differentiated to account for line losses corresponding to the [~~type of~~] voltage at which the electric service is provided.

(2) The scope of a fuel factor revision proceeding under subsection (a)(1)(B) of this section is limited to the issue of whether the petitioning electric utility has appropriately calculated its proposed fuel factors [~~estimated eligible fuel expenses and load~~]. In a proceeding to revise fuel factors pursuant to subsection (a)(1)(B) of this section, an electric utility has the burden of proving that:

(A) the electric utility has calculated its proposed fuel factors in compliance with the commission-approved fuel factor formula; and

(B) the proposed fuel factors utilize a commission-approved adjustment to account for line losses corresponding to the voltage at which the electric service is provided.

(d) Schedule for filing petitions to revise fuel factors. A petition to revise fuel factors or to initiate or revise a fuel factor formula may be filed with any general rate proceeding.

(1) Otherwise, except as provided by subsection (f) of this section which addresses emergencies, petitions by an electric utility to revise fuel factors pursuant to subsection (a)(1)(A) of this section may only be filed [~~during the first five business days of the month~~] in accordance with the following schedule:

(A) [~~(1)~~] February [~~January~~] and August [~~July~~]: El Paso Electric Company [~~and Central Power and Light Company~~];

[~~(2) February and August: Texas Utilities Electric Company;~~]

(B) [~~(3)~~] March and September: [~~West Texas Utilities Company and~~] Entergy Gulf States, Inc.;

(C) [~~(4)~~] April and October: Southwestern Public Service [~~Houston Lighting & Power~~] Company;

(D) [~~(5)~~] May and November: Southwestern Electric Power Company[~~, Southwestern Public Service Company, and Lower Colorado River Authority~~]; and

(E) [~~(6)~~] July and January: [~~June and December: Texas-New Mexico Power Company, and~~] any other electric utility not named in this subsection that uses one or more fuel factors.

(2) Petitions by an electric utility to revise fuel factors pursuant to subsection (a)(1)(B) of this section may be filed in any month except December.

(e) Procedural schedules [~~schedule~~].

(1) Upon the filing of a petition to revise fuel factors pursuant to subsection (a)(1)(A) of this section [ ~~in a separate proceeding~~], the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding as follows:

(A) [~~(1)~~] within 60 days after the petition was filed, if no hearing is requested within 30 days of the petition; and

(B) [~~(2)~~] within 90 days after the petition was filed, if a hearing is requested within 30 days of the petition. If a hearing is requested, the hearing will be held no earlier than the first business day after the 45th day after the application was filed.

(2) Upon the filing of a petition to revise fuel factors pursuant to subsection (a)(1)(B) of this section, the presiding officer shall set a procedural schedule as follows:

(A) the presiding officer shall issue an order approving the proposed fuel factors on an interim basis no later than 12 days after the date the petition was filed, if no objection to interim approval is filed within 10 days after the date the petition was filed;

(B) if no hearing is requested within 30 days after the petition was filed, the presiding officer shall, after submission of proof of notice by the electric utility, issue an order approving the fuel factors without hearing or action by the commission; and

(C) if a hearing is requested within 30 days after the petition was filed, the hearing will be held no earlier than the first business day after the 45th day after the petition was filed and a final order will be issued within 90 days after the petition was filed, subject to submission of proof of notice by the electric utility.

(f) Emergency revisions to the fuel factor. If fuel curtailments, equipment failure, strikes, embargoes, sanctions, or other reasonably unforeseeable circumstances have caused a material under-recovery of eligible fuel costs, the electric utility may file a petition with the commission requesting an emergency interim fuel factor. Such emergency requests shall state the nature of the emergency, the magnitude of change in fuel costs resulting from the emergency circumstances, and other information required to support the emergency interim fuel factor. The commission shall issue an interim order within 30 days after such petition is filed to establish an interim emergency fuel factor. If within 120 days after implementation, the emergency interim factor is found by the commission to have been excessive, the electric utility shall refund all excessive collections with interest calculated on the cumulative monthly ending under- or over-recovery balance in the manner and at the rate established by the commission for overbilling and underbilling in §25.28(c) and (d) of this title (relating to Bill Payment and Adjustments Billing). If, after full investigation, the commission determines that no emergency condition existed, a penalty of up to 10% of such over-collections may also be imposed on investor-owned electric utilities.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801083
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 936-7223

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# CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS
# SUBCHAPTER C. INFRASTRUCTURE AND RELIABILITY

**16 TAC §26.56**

The Public Utility Commission of Texas (commission) proposes new §26.56, relating to Central Office and Remote Facilities Reliability. The commission proposes this new rule in an effort to implement recommendations made by Project Number 32182, *PUC Investigation of Methods to Improve Electric and Telecommunications Infrastructure to Minimize Long Term Outages and Restoration Costs Associated with Gulf Coast Hurricanes* ("Hurricane Infrastructure Report"). The proposed new rule will implement recommendations made in the Hurricane Infrastructure Report. Specifically, the proposed new rule will establish minimum requirements for the construction of a central office or remote facility above the 100-year floodplain and for the installation of emergency power at a central office to ensure safe and reliable operation during power outages and severe flooding. Project Number 34742 is assigned to this proceeding.

Nara Srinivasa, Director of the Reliability and Licensing Section in the Infrastructure and Reliability Division, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Nara Srinivasa has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be a more reliable telecommunication system that is better capable of responding to a natural disaster. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. Therefore, no regulatory flexibility analysis is required. There may be economic costs to persons who are required to comply with the proposed section. These costs are associated with providing emergency power at central offices and the potential extra design and acquisition costs associated with constructing central offices and remote facilities above the 100-year floodplain. Further, the costs associated with complying with this section are likely to vary from business to business and are difficult to ascertain. However, as explained in the Hurricane Infrastructure Report, it is believed that the benefits accrued from implementing the proposed section will outweigh the costs.

Nara Srinivasa has also determined that for each year of the first five years the proposed section is in effect there should be no adverse effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested, pursuant to the Administrative Procedure Act, Texas Government Code §2001.029 in Hearing Room Gee, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701, on Wednesday, April 30, 2008, at 9:30 a.m. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed new section may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Sixteen copies of comments to the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule(s). The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 34742.

This new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007 and Supp. 2007) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §14.001, which gives the commission the general power to regulate and supervise the business of each public utility; PURA §52.106, which grants the commission the authority to regulate rates, operations, and services of telecommunication utilities so that the services provided are adequate and efficient, and PURA §55.002, which grants the commission the authority to adopt just and reasonable standards, classifications, rules, or practices a telecommunication utility must follow in furnishing a service.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 52.106, and 55.002.

*§26.56. Central Office and Remote Facilities Reliability.*

(a) Purpose. The purpose of this section is to establish minimum requirements for the construction of new central offices and remote facilities above the 100-year floodplain and for the installation of emergency power at all central offices located in coastal areas to ensure safe and reliable operation during power outages and severe flooding.

(b) Application. This section applies to all certificated telecommunications utilities (CTU) as defined by §26.5(36) of this title relating to Definitions.

(c) Definitions.

(1) Central Office--A switching unit in a telecommunications system that provides service to the general public and that has the necessary equipment and operating arrangements for terminating and interconnecting customer lines and trunks or trunks only.

(2) Remote Facility--remote switch, digital loop carrier, or pair gain devise.

(3) Coastal Areas--The areas located within the Hurricane Evacuation Zone Boundary as established by the Texas Department of Emergency Management.

(d) Emergency power. CTUs shall have each of its central offices located in coastal areas capable of full and complete normal operation for 72 hours after loss of the sources of electric utility provided electricity.

(e) Construction. For a new central office or remote facility that will be located in a 100-year floodplain, a CTU shall design and construct the central office or remote facility so that the electrically energized portions shall be not less than one foot above the 100-year floodplain. The CTU shall determine whether the location of the substation is in a 100-year floodplain using floodplain maps from the Federal Emergency Management Agency (FEMA). If FEMA maps are not available for the site of the central office or remote facility, the CTU shall use a Texas-registered Professional Engineer or a Professional Hydrologist as certified by the American Institute of Hydrology to determine the location of the floodplain.

(f) Effective Date. This section takes effect on January 1, 2010.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801085
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 936-7223

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# CHAPTER 27. RULES FOR ADMINISTRATIVE SERVICES

## SUBCHAPTER B. HISTORICALLY UNDERUTILIZED BUSINESSES

### 16 TAC §27.31

The Public Utility Commission of Texas (commission) proposes an amendment to §27.31 relating to Historically Underutilized Business Program. The amendment to §27.31 is necessary in order to incorporate the changes enacted through House Bill 3560, 80th Legislature, 2007 (HB 3560) which renamed the Texas Building and Procurement Commission as the Texas Facilities Commission and transferred certain duties from the Texas Building and Procurement Commission to the Comptroller of Public Accounts. Specifically, the Texas Facilities Commission retains its powers and duties that relate to buildings and facilities, surplus and salvage property and child care services for state employees. All other duties and powers of the Texas Building and Procurement Commission were transferred to the Comptroller of Public Accounts. Under the HB 3560, rules of the Texas Building and Procurement Commission that are related to an activity transferred by the bill to the Comptroller of Public Accounts continue in effect as the rules of the Comptroller of Public Accounts until superseded by an act of the Comptroller of Public Accounts. The name change and transfer of duties became effective September 1, 2007. Before September 1, 2007, the commission, under Texas Government Code §2161.003, was required to adopt the Historically Underutilized Business (HUB) Program rules from the Texas Building and Procurement Commission (formerly called the Texas General Services Commission). As a result, the current §27.31 states that "the commission adopts by reference the rules of the Texas General Services Commission." Because the HUB program rules, which were located under Title 1, Part 5, Chapter 111, Subchapter B, have now been transferred and reorganized under Title 34, Part 1, Chapter 20 of the Texas Administrative Code, an amendment to §27.31 is necessary to comply with Texas Government Code §2161.003. Project Number 35351 is assigned to this proceeding.

Leticia Flores, General Counsel, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Ms. Flores has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be a streamlined method for securing more goods and services from HUB vendors. There will be no effect on small businesses or micro-businesses as a result of enforcing this section, therefore, no regulatory flexibility analysis is necessary. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Ms. Flores has also determined that for each year of the first five years the proposed section is in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under the Administrative Procedure Act §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029. The request for a public hearing must be received within 30 days after publication.

Comments on the proposed new rule (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. All comments should refer to Project Number 35351.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (Vernon 2007 and Supp. 2007) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure; and Texas Government Code §2161.003, which requires the commission to adopt the Comptroller of Public Accounts rules for Historically Underutilized Businesses.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052; Texas Government Code §2161.003.

*§27.31. Historically Underutilized Business Program.*

The commission adopts by reference the rules of the Comptroller of Public Accounts [~~Texas General Services Commission~~] in 34 [~~1~~] Texas Administrative Code (TAC) §§20.11, 20.13, 20.14, 20.26 and 20.27 [~~§§111.11, 111.13, 111.14, 111.26, and 111.27~~], relating to the Historically Underutilized Business Program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801074
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 936-7223

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# PART 9. TEXAS LOTTERY COMMISSION

## CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES

## SUBCHAPTER B. CONDUCT OF BINGO

**16 TAC §402.210**

The Texas Lottery Commission (Commission) proposes new Title 16, Part 9, Chapter 402, Subchapter B, §402.210 (relating to House Rules). The proposed new rule replaces withdrawn proposed new §402.210 (relating to House Rules) which was published in the *Texas Register* on October 5, 2007 (32 TexReg 6962).

The purpose of the proposed new rule is to set out the minimum requirements for house rules informing players in detail of how a licensed authorized organization will conduct its bingo games. Specifically, the new rule requires licensed authorized organizations to develop and adhere to its house rules and ensure that the house rules are consistently applied and made available to anyone upon request. The new rule also provides that the house rules shall not conflict with the Bingo Enabling Act or the Charitable Bingo Administrative Rules.

Kathy Pyka, Controller, has determined that, for each year of the first five years the proposed new rule would be in effect, there are no foreseeable implications related to cost or revenues of the state or local governments expected as a result of enforcing or administering the rule. Ms. Pyka has also determined that there would be no adverse economic effect on small businesses, micro businesses, or local or state employment. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an economic effect on small businesses as defined in Tex. Govt. Code, §2006.001(2). All entities subject to the proposed new rule are non-profit organizations.

Philip D. Sanderson, Director of the Charitable Bingo Operations Division, has determined that, for each year of the first five years the proposed new rule would be in effect, the public benefit anticipated is a rule that will provide interested parties with the rules adopted by the licensed authorized organization to explain in detail how the organization is going to conduct its bingo games. Mr. Sanderson has also determined that there would be no probable economic cost to persons required to comply with the rule.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed new rule may be submitted to Sandra Joseph, Assistant General Counsel, by mail to Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by e-mail to www.legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 10:00 a.m. on March 20, 2008, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under the Texas Occupations Code, §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act. The new rule is also proposed under Texas Government Code, §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

The proposed new rule implements the Texas Occupations Code, Chapter 2001.

*§402.210. House Rules.*

(a) House rules are rules adopted by the licensed authorized organization that have been developed by its officers to inform players in detail of how the organization will conduct its bingo games.

(b) The licensed authorized organization shall develop house rules.

(c) The licensed authorized organization shall adhere to its house rules.

(d) The operator on duty is responsible for ensuring house rules are consistently applied.

(e) The house rules must be made available to anyone upon request.

(f) House rules shall not conflict with the Bingo Enabling Act or the Charitable Bingo Administrative Rules.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801070
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 344-5012

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# TITLE 19. EDUCATION

# PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

## CHAPTER 17. RESOURCE PLANNING

## SUBCHAPTER C. RULES APPLYING TO ALL PROJECTS

**19 TAC §17.21**

The Texas Higher Education Coordinating Board proposes an amendment to §17.21, concerning Resource Planning. Specifically, the proposed amendments to §17.21(c)(2) will change the submission date from at least 70 days to at least 80 days prior to the regularly scheduled Board meeting for projects seeking Committee on Strategic Planning and Board approval.

Ms. Susan Brown, Assistant Commissioner, Planning and Accountability, has determined that for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Brown has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be more efficient Board operations relating to institution facility project applications and approvals. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Jeff Treichel, Director, Finance and Resource Planning, 1200 East Anderson Lane, Austin, TX 78752, jeff.treichel@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Education Code, §§61.027, 61.0572, 61.058, and 51.927.

The amendment affects Texas Education Code, §§61.0572, 61.058, and 51.927.

*§17.21. Application Procedures.*

(a) - (b) (No change.)

(c) Project submission schedule:

(1) (No change.)

(2) Projects to be considered by the Committee on Strategic Planning or the Board shall be submitted at least 80 [~~70~~] days prior to the regularly scheduled Board meeting at which consideration is desired.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200800995
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: April 24, 2008
For further information, please call: (512) 427-6114

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# PART 2. TEXAS EDUCATION AGENCY

## CHAPTER 103. HEALTH AND SAFETY

## SUBCHAPTER BB. COMMISSIONER'S RULES CONCERNING GENERAL PROCEDURES FOR HEALTH AND SAFETY

### 19 TAC §103.1101

The Texas Education Agency (TEA) proposes new §103.1101, concerning automated external defibrillator (AED) reimbursement. The proposed new section would implement requirements of the Texas Education Code (TEC), §38.017, added by Senate Bill (SB) 7, and the General Appropriations Act, House Bill 1, 80th Texas Legislature, 2007.

TEC, §38.017, Availability of Automated External Defibrillator, requires each school district and open-enrollment charter school to make an AED device available on each campus. The General Appropriations Act, Article IX, Section 19.86, 2007, authorizes the commissioner of education to adopt rules as necessary to implement a program to reimburse school districts and open-enrollment charter schools for costs associated with the purchase of AED devices. Accordingly, the commissioner exercises rulemaking authority to address provisions relating to the reimbursement program for AED devices. Proposed new 19 TAC §103.1101 would establish the following procedures relating to AED reimbursements.

Subsection (a) would specify that a campus that demonstrates priority and need would be reimbursed for one AED device. Each campus that did not have an AED device as of June 1, 2007, would be reimbursed for one AED device per campus that was purchased between June 1, 2007, and June 30, 2008. The subsection would also set forth the definition of "campus" for the purpose of AED reimbursement and would establish priority and need.

Subsection (b) would propose in rule the reimbursement application form that must be submitted to the TEA and would establish that applicants for reimbursement must include verification of the AED device purchase.

Subsection (c) would specify that each reimbursement would be for the actual amount paid for the AED device or a maximum of $1,475, whichever is less.

Subsection (d) would establish that the availability of funds after reimbursements are made to school districts and open-enrollment charter schools would determine whether reimbursements would be made to private schools.

Subsection (e) would clarify that any donated AED device or AED device purchased with funds donated for such purchase would be ineligible for reimbursement.

The proposed new rule would require each school district and open-enrollment charter school that is seeking AED reimbursement to submit an application and identifying information about AED devices purchased in response to Senate Bill 7 requirements. School districts and open-enrollment charter schools would be required to maintain AED device purchase receipts.

Jeff Kloster, associate commissioner for health and safety, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state government as a result of enforcing or administering the new section. The proposal would establish in rule the procedures for reimbursements for the acquisition of AED devices. The General Appropriations Act, House Bill 1, 80th Texas Legislature, 2007, allocated not more than $9 million to the TEA in fiscal year 2008 to reimburse school districts and open-enrollment charter schools for costs associated with the purchase of AED devices, giving funding priority based on greatest need. Any balances available as of August 31, 2008, are appropriated for fiscal year 2009 for the same purposes.

There will be fiscal implications for local government. School districts and open-enrollment charter schools can be reimbursed for the expense of the purchase of AED devices for up to a maximum amount of $1,475. Reimbursement will be dependent on the availability of funds, the actual cost of an AED device, and whether the AED device cost exceeds the amount eligible for reimbursement. Local school districts and open-enrollment charter schools may experience a loss of revenue if their AED device costs exceed the amount eligible for reimbursement or if requests for reimbursements exceed the available funds. Donated AED devices and AED devices purchased before June 1, 2007, or after the reimbursement due date will not be eligible for reimbursement.

Mr. Kloster has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be providing each school district and open-enrollment charter school with the opportunity to be reimbursed for the purchase of one AED device on each campus. Students, staff, and the public would have one AED device available at each campus, providing a rapid response to cardiac emergencies. There is no anticipated economic cost to persons who are required to comply with the new section.

There is no projected economic impact to small businesses or microbusinesses. No regulatory flexibility analysis is required.

The public comment period on the proposal begins March 7, 2008, and ends April 6, 2008. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed new section submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The new section is proposed under the General Appropriations Act (House Bill 1), 80th Texas Legislature, 2007, Article IX, Section 19.86, which authorizes the commissioner of education to adopt rules as necessary to implement a program to reimburse school districts and open-enrollment charters for costs associated with the purchase of AED devices.

The proposed new section implements the General Appropriations Act (House Bill 1), 80th Texas Legislature, 2007, Article IX, Section 19.86, and Texas Education Code, §38.017.

*§103.1101. Automated External Defibrillator (AED) Reimbursement.*

(a) Eligibility. Each school district and open-enrollment charter school campus that demonstrates priority and need as set forth in this subsection may receive reimbursement for the cost of one automated external defibrillator (AED) device.

(1) For purposes of this section, a "campus" is defined as a single physical facility with a unique physical address.

(2) Each school district and open-enrollment charter school campus that did not have an AED device located at the campus prior to June 1, 2007, has priority for receiving reimbursement for the purchase of an AED device.

(3) Each school district and open-enrollment charter school campus that purchased an AED device on or after June 1, 2007, and did not have an AED device located at the campus prior to June 1, 2007, has the greatest need for reimbursement for the purchase of an AED device.

(b) Application and reimbursement. In order to receive AED reimbursement, each eligible school district and open-enrollment charter school that has at least one campus that has demonstrated priority and need as set forth in subsection (a) of this section shall submit:

(1) the reimbursement application provided in this subsection entitled, "Automated External Defibrillator (AED) Reimbursement"; and
Figure: 19 TAC §103.1101(b)(1)

(2) a copy of each invoice which documents the purchase and contains the purchase price and the purchase date.

(c) Reimbursement amount. Each school district and open-enrollment charter school campus that has been approved for AED reimbursement is eligible to be reimbursed for the actual amount paid for the AED device or a maximum of $1,475, whichever is less.

(d) Additional available funds. Should funds be available after the AED reimbursements established by subsection (a) of this section are issued, reimbursements may be made to private school campuses that demonstrate priority and need as set forth in subsection (a) of this section.

(e) Donations. In all cases, donated AED devices or AED devices purchased with donated funds are ineligible for reimbursement regardless of the date of receipt or purchase.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801118
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 475-1497

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# TITLE 22. EXAMINING BOARDS

## PART 9. TEXAS MEDICAL BOARD

### CHAPTER 162. SUPERVISION OF MEDICAL SCHOOL STUDENTS

**22 TAC §162.1**

The Texas Medical Board proposes an amendment to §162.1, concerning Supervision of Medical Students.

The amendment to §162.1 updates the name of the Texas Medical Board and provides limited circumstances for when a physician who is employed by the federal government physician but who is not licensed in Texas may supervise a medical student.

Elsewhere in this issue of the *Texas Register* the Texas Medical Board contemporaneously withdraws the amendment to §162.1 which was published for proposal in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6237).

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government

as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed.

Mr. Simpson also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to provide clarity to the rule and to specify that a physician employed by the federal government who is not licensed in Texas may supervise medical students if the physician is within the scope of the federal project. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

Section 152.001, Texas Occupations Code Annotated, is affected by the proposal.

*§162.1. Supervision of Medical Students.*

(a) In order to supervise a medical student, a physician must have an active and unrestricted Texas license, and the medical student must meet [~~Only a physician with a current and unrestricted Texas medical license may supervise a medical student if the medical student meets~~] the following criteria:

(1) is enrolled at a Texas medical school;

(2) is a student at a medical school located outside Texas and is enrolled as a visiting student at a Texas medical school; or

(3) will receive supervised medical education in a Texas hospital or teaching institution sponsoring or participating in a program of graduate medical education accredited by the Accrediting Council for Graduate Medical Education, the American Osteopathic Association, or the Texas Medical Board [~~State Board of Medical Examiners~~] in the same subject as the medical or osteopathic medical education in which the hospital or teaching institution has an agreement with the applicant's school.

(b) If the physician is not licensed in Texas as required in subsection (a) of this section, the physician must be employed by the federal government and maintain an active and unrestricted license. Physician applicants who receive medical education in the United States in settings that do not comply with statutory requirements set forth in Texas Occupations Code §155.003(b) - (c) may be ineligible for licensure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801113
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 305-7016

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# CHAPTER 164. PHYSICIAN ADVERTISING

**22 TAC §164.3**

The Texas Medical Board proposes an amendment to §164.3, concerning Misleading or Deceptive Advertising.

The amendment to §164.3 redefines "solicitation" by deleting reference to "door to door solicitation" and referring to Texas Occupations Code, §102.001(a).

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed.

Mr. Simpson also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be to clarify interpretation of "solicitation." There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001 and §164.052, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

Section 102.001(a), Texas Occupations Code Annotated, is affected by the proposal.

*§164.3. Misleading or Deceptive Advertising.*

No physician shall disseminate or cause the dissemination of any advertisement that is in any way false, deceptive, or misleading. Any advertisement shall be deemed by the board to be false, deceptive, or misleading if it:

(1) contains material false claims or misrepresentations of material facts which cannot be substantiated;

(2) contains material implied false claims or implied misrepresentations of material fact;

(3) omits material facts;

(4) makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;

(5) advertises or assures a permanent cure for an incurable disease;

(6) compares a health care professional's services with another health care professional's services unless the comparison can be factually substantiated;

(7) advertises professional superiority or the performance of professional service in a superior manner if the advertising is not subject to verification;

(8) contains a testimonial that includes false, deceptive, or misleading statements, or fails to include disclaimers or warnings as to the credentials of the person making the testimonial;

(9) includes photographs or other representations of models or actors without explicitly identifying them as models and not actual patients;

(10) causes confusion or misunderstanding as to the credentials, education, or licensure of a health care professional;

(11) represents that health care insurance deductibles or copayments may be waived or are not applicable to health care services to be provided if the deductibles or copayments are required;

(12) represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or copayments are required;

(13) states that a service is free when it is not, or contains untruthful or deceptive claims regarding costs and fees. If other costs are frequently incurred when the advertised service is obtained then this should be disclosed. Offers of free service must indeed be free. To state that a service is free but a third party is billed is deceptive and subject to disciplinary action;

(14) makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of patient;

(15) advertises or represents in the use of a professional name, a title or professional identification that is expressly or commonly reserved to or used by another profession or professional;

(16) claims that a physician has a unique or exclusive skill without substantiation of such claim;

(17) involves uninvited solicitation such as [~~door to door solicitation of a given population or other such tactics for~~] "drumming" patients or conduct considered an offense under Texas Occupations Code §102.001(a) relating to the solicitation of patients; or

(18) fails to disclose the fact of giving compensation or anything of value to representatives of the press, radio, television or other communicative medium in anticipation of or in return for any advertisement, article, or infomercial, unless the nature, format or medium of such advertisement makes the fact of compensation apparent.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801114
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 305-7016

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# CHAPTER 173. PHYSICIAN PROFILES

**22 TAC §173.3, §173.7**

The Texas Medical Board proposes amendments to §173.3, concerning Physician-Initiated Updates and §173.7, concerning Corrections and the Dispute Process.

The amendment to §173.3 provides descriptive information for citations to statutes. The amendment to §173.7 clarifies that dispute process applies to any update of a profile discussed in Chapter 173.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the sections are in effect there will be no fiscal implications to state or local government as a result of enforcing the sections as proposed. There will be no effect to individuals required to comply with the rules as proposed.

Mr. Simpson also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections provides clarity regarding the statutes that are referred to in the rule and provides clarity regarding updates that may be disputed by a physician. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendments are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

*§173.3. Physician-Initiated Updates.*

(a) Physicians are required to attest as to whether or not the physician's profile information is correct at the time of the physician's registration and to initiate correction of any incorrect information.

(b) Physicians should maintain current profile information by submitting updates and corrections as changes occur.

(c) The physician shall make necessary corrections and updates by submitting a profile update and correction form or by submitting it online if completing the registration via the internet.

(d) A physician shall report the following to the Board within 30 days after the event:

(1) Any change of address;

(2) Incarceration in a state or federal penitentiary;

(3) An initial conviction, final conviction, or placement on deferred adjudication, community supervision, or deferred disposition for:

(A) a felony;

(B) a misdemeanor that directly relates to the duties and responsibilities of a physician licensed by the board;

(C) a misdemeanor involving moral turpitude;

(D) a misdemeanor under Chapter 22, Penal Code (relating to assaultive offenses), other than a misdemeanor punishable by fine only;

(E) a misdemeanor on conviction of which a defendant is required to register as a sex offender under Chapter 62, Code of Criminal Procedure;

(F) a misdemeanor under §25.07, Penal Code (relating to the violation of a protective order or a magistrate's order); or

(G) a misdemeanor under §25.071, Penal Code (relating to the violation of a protective order preventing offenses caused by bias or prejudice); or

(4) An initial finding by the trier of fact of guilt of a felony under:

(A) Chapter 481 or 483, Health and Safety Code (relating to offenses involving controlled substances and dangerous drugs);

(B) Section 485.033, Health and Safety Code (relating to offenses involving inhalant paraphernalia); or

(C) the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. §801 et seq.).

*§173.7. Corrections and the Dispute Process.*

(a) If the physician wishes to make corrections or dispute the proposed profile information updated under any section of this chapter, the procedures in this section shall apply.

(b) If the board receives the Form from the physician without corrections to the profile information, the profile shall be made available to the public as is.

(c) If the board receives the Form from the physician and the physician has indicated corrections to the information on the Form, the board shall review the proposed corrections.

(d) If the board determines that the physician's corrections are satisfactory, the board shall update the profile information and make the profile available to the public.

(e) If the board determines that the physician's corrections are unsatisfactory, the board shall so notify the physician, along with a presentation of the information in a format satisfactory to the board, and instructions of the process that the physician must follow to dispute the information.

(f) If the physician wishes to dispute the profile information which is in the format satisfactory to the board, the physician must submit a formal letter of dispute to the board within two weeks of the date of the notification in subsection (e) of this section. The physician must then submit proof of factual error to the board within one month of the date of the notification in subsection (e) of this section.

(g) Upon receipt of the formal letter of dispute from the physician, a notation that the information under dispute is "Not available" shall be attached to the appropriate category of the physician's profile and such notation shall be made available to the public on the profile.

(h) After review of the proof provided by the physician during the dispute process as described in subsection (f) of this section, the board shall make a determination as to the profile information to be provided to the public.

(i) Upon determination by the board of the dispute, the board shall notify the physician of the determination, shall update the physician's profile with the information, shall remove the "Not available" notation and shall make the profile available to the public.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801115
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 305-7016

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# CHAPTER 196. VOLUNTARY RELINQUISHMENT OR SURRENDER OF A MEDICAL LICENSE

**22 TAC §196.1**

The Texas Medical Board proposes an amendment to §196.1, concerning Relinquishment of License.

The amendment to §196.1 requires request to relinquish a license to be submitted in writing and deletes the requirement that the full board review a request for relinquishment.

Robert D. Simpson, General Counsel, Texas Medical Board, has determined that for the first five-year period the section is in effect there will be no fiscal implications to state or local government as a result of enforcing the section as proposed. There will be no effect to individuals required to comply with the rule as proposed.

Mr. Simpson also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section is to simplify procedures for relinquishment of a license. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Sally Durocher, P.O. Box 2018, Austin, Texas 78768-2018. A public hearing will be held at a later date.

The amendment is proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

No other statutes, articles or codes are affected by the proposal.

*§196.1. Relinquishment of License.*

(a) Relinquishment by licensee.

(1) A licensee may at any time voluntarily relinquish his or her license to practice medicine in Texas for any reason, without compulsion.

(2) Requests to relinquish a license must be submitted to the Board in writing. [~~Tender of the license may be by delivery by any means to the offices of the board, return receipt requested.~~]

(b) Acceptance by the board. The board shall accept all voluntary relinquishment requests except when a licensee is under investigation or subject to disciplinary action by the board. [~~, based on a petition or request presented to the full board by a licensee or based on the recommendation of a committee, a panel, or representative(s) of the board, may consider whether to formally accept the voluntary relinquishment of the Texas medical license; however, relinquishment of a Texas medical license without acceptance thereof by the board, or a licensee's failure to pay his or her registration fee after initiation of an investigation but prior to imposition of a disciplinary order by the board, shall not result in cancellation of the license and shall not deprive the board of jurisdiction in regard to disciplinary action against the licensee.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801116
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 305-7016

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# PART 14. TEXAS OPTOMETRY BOARD

## CHAPTER 280. THERAPEUTIC OPTOMETRY

**22 TAC §280.8**

The Texas Optometry Board proposes amendments to §280.8, concerning satisfaction of course work, examination and skill evaluation requirements for the optometric glaucoma specialist application. The amendments allow approved schools or colleges of optometry to show that the course work and examination required by statute are part of the current curriculum. Applicants from such programs may have the required skills evaluation performed by an optometric glaucoma specialist.

Chris Kloeris, executive director of the Texas Optometry Board, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state and local government as a result of enforcing or administering the amendments.

Chris Kloeris also has determined that for each of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amendments will be that applicants for an optometric glaucoma specialist license will no longer be required to close or leave their practices, or to make arrangements to leave internship practices, in order to obtain course work previously completed in optometry school.

Economic Impact Statement and Regulatory Flexibility Analysis

The Board licenses approximately 3,600 optometrists and therapeutic optometrists. Approximately 2,900 have active licenses. A significant majority of licensees own or work in one or more of the 1,000 to 3,000 optometric practices which meet the definition of a small business. Some of these practices meet the definition of a micro business. The Board does not license these practices.

It is anticipated that there will be no economic costs for persons or businesses who are required to comply with the amendments. Since future applicants will not be required under the amendments to leave practices and internships to travel to the limited sites providing a repeat of the course work, the amendments should result in significant cost savings to these persons. No disparate effect is foreseen on small or micro-businesses.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register.*

The amendment is proposed under the Texas Optometry Act, Texas Occupations Code, §351.151 and §351.3581. No other sections are affected by the amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession. Section 351.3581 sets the requirements for optometric glaucoma specialist license.

*§280.8. Optometric Glaucoma Specialist: Required Education, Examination and Clinical Skills Evaluation.*

(a) - (d) (No change.)

(e) Applicants Graduating from Curriculums Which Include Course Work. An applicant shall be considered as having met the requirements of subsections (a) - (c) of this section, provided:

(1) the Board determines in a review of the curriculum of a school or college that:

(A) the course work and examination required for certification in this section is included in the regular curriculum required for graduation from the school or college of optometry, and

(B) the students of the school or college receive clinical training in the skills listed in subsection (d) of this section.

(2) Clinical Skills Evaluation. Notwithstanding subsection (d) of this section, each applicant meeting the requirements of paragraph (3) of this subsection shall submit a signed and dated certification prepared by a licensed ophthalmologist or optometric glaucoma specialist. The certification shall confirm the demonstration by the applicant in an adequate and appropriate manner, as directly observed by the ophthalmologist or optometric glaucoma specialist, of the following skills:

(A) tonometry,

(B) gonioscopy,

(C) slit lamp examination,

(D) optic nerve examination/fundus, and

(E) interpretation of visual fields.

(3) This rule shall apply to all applicants graduating on or after May 1, 2008, from a school or college of optometry for which the Board has issued a determination under paragraph (1) of this subsection, in the calendar year during which the determination was issued or any year thereafter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 21, 2008.

TRD-200801044
Chris Kloeris
Executive Director
Texas Optometry Board
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 305-8502

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# PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

## CHAPTER 329. LICENSING PROCEDURE

**22 TAC §329.5**

The Texas Board of Physical Therapy Examiners proposes amendments to §329.5, concerning Licensing Procedures for Foreign-Trained Applicants. The amendments allows foreign-trained applicants to use a physical therapist licensed in the U.S. rather than Texas to attest to their abilities to com-

municate in English, and increase the amount of professional education required to 90 hours, the minimum number required by accredited PT programs in the U.S.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Mr. Maline also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing the amended rule will be reasonable requirements for foreign-trained applicants. The increase in professional education hours will mean that foreign-trained therapists will have equivalent education to domestic-trained therapists. Because the number of hours of professional education has been increased, foreign-trained applicants may need to take more courses to meet the educational requirements for licensure. This could result in an economic cost to them, as universities generally charge by semester hour. The Board anticipates no cost to small businesses.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; e-mail: nhurter@mail.capnet.state.tx.us.

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by the amendments.

*§329.5. Licensing Procedures for Foreign-Trained Applicants.*

(a) - (e) (No change.)

(f) Guidelines for board-approved education credentialing entities.

(1) - (2) (No change.)

(3) All foreign-trained applicants must demonstrate the ability to communicate in English by making the minimum score accepted by the board on the TOEFL tests. This requirement is waived for graduates of entry-level physical therapy programs in Australia, Canada (except Quebec), Ireland, New Zealand and the United Kingdom, and for graduates of entry-level programs accredited by the Commission on Accreditation in Physical Therapy Education (CAPTE) at time of graduation. For graduates of entry-level physical therapy programs in other foreign countries, the Board may grant an exception to the TOEFL tests if the applicant holds a current license in physical therapy in another state and has been licensed in the U.S. for 10 years prior to application. The Board also may grant an exception to the TOEFL tests to an applicant who submits satisfactory proof that he/she is a citizen or lawful permanent resident of the United States, and has attended four or more years of secondary or post-secondary education in the U.S. Regarding the Paper-based and Computer-based TOEFL tests: If an applicant makes a score of 50 on the TSE, the board will allow the applicant to submit three original, notarized letters of recommendation from individuals who have practical knowledge of the applicant's ability to communicate successfully in spoken English. Individuals who provide this written testimony must be native English speakers, cannot be related by blood or marriage to the applicant, and at least one of the letters must be from a PT licensed to practice in the U.S [~~Texas~~]. These letters must be submitted by their authors directly to the board. At the board's discretion, the letters may be considered satisfactory evidence of proficiency in spoken English. Minimum acceptable scores for the TOEFL tests are as follow:

(A) - (C) (No change.)

(4) - (7) (No change.)

(8) The credentialing entity must attest that the applicant has successfully completed an educational program substantially equivalent to U.S. programs accredited by the Commission on Accreditation in Physical Therapy Education (CAPTE) and has earned the equivalent of a minimum of 90 [~~72~~] semester hours of professional physical therapy education. The program must be post-secondary, requiring for entry the equivalent of high school graduation in the United States; must consist of at least three years of classroom instruction; and must result in the award of the first academic diploma or degree leading to professional practice in physical therapy. The applicant must have completed courses in each of the following broad areas: basic sciences, clinical science, and physical therapy theory and procedures. The applicant must have also successfully completed United States required equivalent courses/hours in clinical education. The applicant must have successfully completed at least 15 semester credit hours in clinical education (upper division level) but will receive credit for no more than 23 semester hours. If the applicant has completed the required course work in clinical education but the transcript does not reflect the required credit hours then the credentialing entity may use the conversion formula of 60 contact hours per one semester credit.

(9) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200800999
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 305-6900

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# TITLE 25. HEALTH SERVICES

## PART 1. DEPARTMENT OF STATE HEALTH SERVICES

### CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

### SUBCHAPTER Q. REPORTING, TREATMENT AND INVESTIGATION OF CHILD BLOOD LEAD LEVELS

**25 TAC §§37.331 - 37.339**

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §§37.331 - 37.336

and new §§37.337 - 37.339, concerning the reporting and control of child lead poisoning.

BACKGROUND AND PURPOSE

The rules as proposed are necessary to comply with the Texas Health and Safety Code, Chapter 88, which requires the department to adopt rules concerning the reporting and control of childhood lead poisoning.

Government Code §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §§37.331 - 37.336 and has determined that reasons for adopting these sections are still valid and, therefore, these rules on childhood lead poisoning are still necessary. New §§37.337 - 37.339 were added because of amendments to the Texas Health and Safety Code, Chapter 88, by the 80th Texas Legislature, 2007.

SECTION-BY-SECTION SUMMARY

The amendments to §37.331 update legacy agency names and organizational structure to reflect the post-consolidation operations of the department and the Health and Human Services Commission. Amendments to §37.332 add new definitions and delete definitions no longer referenced in text. Amendments to §37.333 add text stating that confidential information provided to the department is in pursuant to the Texas Health and Safety Code, Chapter 88, §88.002. Amendments to §37.334 update information required for the registry of children's blood lead test results. Section 37.335 was amended to state "any facility in which a laboratory conducts blood lead testing." Amendments to §37.336 update legacy agency names, delete reporting of blood lead level results to the local health authority, and change the preferred method of reporting to electronic transmission. New §37.337, §37.338, and §37.339 were added to define the criteria and procedures for follow up care and environmental lead investigations pursuant to the Texas Health and Safety Code, §88.007, §88.008 and §88.009.

FISCAL NOTE

Casey S. Blass, Director, Disease Prevention and Intervention Section, has determined that for each year of the first five-year period that the sections are in effect, there will be no fiscal implications to the state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Blass has determined that there will be no effect on small businesses or micro-businesses or persons who are required to comply with the sections as proposed because their business practices will not be altered. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Blass has also determined that for each year of the first five years the sections are in effect, the public will benefit from the sections as proposed in that they update agency names, reflect changes to organizational structure, and changes to operating procedures to eliminate possible confusion caused by outdated information in the rules.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined as a rule in which the specific intent is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKING IMPACT ASSESSMENT

The department has determined that the proposed rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Teresa Willis, Texas Childhood Lead Poisoning Prevention Program, Department of State Health Services, 1100 W 49th Street, Austin, Texas 78756, (512) 458-7269, extension 6318 or by email to teresa.willis@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed rules are authorized by the Health and Safety Code, §88.003, which requires rules on reporting childhood blood lead levels of concern; and §88.007 which allows rules on follow up care for children with elevated blood lead levels; and Government Code, §531.0055, and the Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed rules affect the Health and Safety Code, Chapters 88 and 1001; and Government Code, Chapters 531 and 2001.

*§37.331. Purpose.*

The purpose of these sections is to implement the provisions of Texas [~~Acts 1995, 74th Legislature, Chapter 965, adding Chapter 88 to the~~] Health and Safety Code, Chapter 88 which provides the Executive Commissioner of the Health and Human Services Commission [~~Texas Board of Health~~] with the authority to adopt rules relating to the reporting of child blood [~~childhood~~] lead levels and control of elevated blood lead levels in children through an understanding of the prevalence and nature of the problem of childhood lead poisoning in Texas.

*§37.332. Definitions.*

The following words and terms, when used in these sections, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Certified lead risk assessor--A person certified by the department to conduct lead risk assessments, inspections, and lead-haz-

ard screens, as defined by Subchapter I, Texas Environmental Lead Reduction, in Chapter 295 of this title concerning Occupational Health.

[~~(1) Blood lead level of concern--Presence of blood lead concentrations suspected to be associated with mental and physical disorders due to absorption, ingestion, or inhalation of lead as specified in the most recent criteria issued by the United States Department of Health and Human Services, United States Public Health Service, Centers for Disease Control and Prevention (CDC).~~]

(2) - (3) (No change.)

(4) Child-occupied facility--A building or part of a building, including a day-care center, preschool, or kindergarten classroom, that is visited regularly by the same child, six years of age or younger, at least two days in any calendar week if the visits are for at least:

(A) three hours each day; and

(B) 60 hours each year.

[~~(4) Commissioner--The Commissioner of the Texas Department of Health.~~]

(5) Coordination of care--Includes overseeing that needed care is provided, including medical follow-up as defined under the most recent criteria issued by the Centers for Disease Control and Prevention of the United States Public Health Service.

(6) [~~(5)~~] Department--The [~~Texas~~] Department of State Health Services.

(7) Environmental lead investigation--An investigation performed by a certified lead risk assessor of the home environment of, or other premises frequented by, a child who has a confirmed elevated blood lead level warranting such an investigation, under the most recent criteria issued by the Centers for Disease Control and Prevention of the United States Public Health Service.

(8) Executive Commissioner--The Executive Commissioner of the Health and Human Services Commission.

(9) Follow-up care--Medical management includes follow-up blood lead testing at the suggested frequency under the most recent criteria issued by the Centers for Disease Control and Prevention of the United States Public Health Service.

(10) [~~(6)~~] Health authority--A physician appointed as such under Texas Health and Safety Code, Chapter 121.

(11) [~~(7)~~] Health professional--An individual whose:

(A) vocation or profession is directly or indirectly related to the maintenance of health in another individual; and

(B) duties require a specified amount of formal education and may require a special examination, certification or license, or membership in a regional or national association.

(12) Lead hazard--An item, surface coating, or environmental media that contains or is contaminated with lead and, when ingested or inhaled, may cause exposures that contribute to elevated blood lead levels in children, including:

(A) an accessible painted surface or coating;

(B) an article for residential or consumer use;

(C) accessible soil and dust, including attic dust; and

(D) food, water, or remedies.

(13) [~~(8)~~] Lead--Metallic lead and materials containing metallic lead with a potential for release in sufficient concentrations to pose a threat to public health.

(14) [~~(9)~~] Lead poisoning--Presence of a confirmed venous blood level established by [~~board~~] rule in the range specified for medical evaluation and possible pharmacologic treatment in the most recent criteria issued by the [~~United States Department of Health and Human Services,~~] United States Public Health Service, Centers for Disease Control and Prevention (CDC). [~~The current level recommended by the CDC is a blood lead concentration of 20 micrograms of lead per deciliter of blood or greater.~~]

(15) [~~(10)~~] Local health department--A department created under the Texas Health and Safety Code, Chapter 121.

(16) [~~(11)~~] Physician--A person licensed to practice medicine by the Texas Medical Board [~~State Board of Medical Examiners~~].

[~~(12) Public health district--A district created under the Texas Health and Safety Code, Chapter 121.~~]

(17) [~~(13)~~] Regional director--A physician appointed [~~by the board~~] as the chief administrative officer of a public health region under the Texas Health and Safety Code, Chapter 121.

*§37.333. Confidentiality of Information Provided to the Department.*

(a) Pursuant to the Texas Health and Safety Code, Chapter 88, §88.002, all data obtained is for the confidential use of the department and the persons or public or private entities that the department determines are necessary to carry out the intent of the Texas Health and Safety Code, Chapter 88, §88.002. Reports, records, and other information collected by, or maintained by, or provided to the [~~Texas~~] Department of State Health Services relating to children's reports of blood lead testing are not public information under open records law and may not be released or made public on subpoena or otherwise, except as described in subsection (b) of this section.

(b) (No change.)

(c) Limited release of the data is allowed by the Texas Health and Safety Code, §88.002.

(d) Any requests for confidential or statistical data shall be made in accordance with Texas Health and Safety Code, §88.002.

*§37.334. Reportable Health Condition.*

(a) All blood lead levels in children 14 years of age or younger shall be [~~are~~] reportable to the [~~Texas~~] Department of State Health Services (department). Elevated blood lead levels for individuals over 14 years of age shall be reported in accordance with Chapter 99 of this title (relating to Occupational Condition Reporting).

(b) (No change.)

(c) Reports shall include all information as required on the Texas Child Blood Lead Level Report Form, Publication #F09-11709, which can be found at http://www.dshs.state.tx.us/lead, or by calling 1-800-588-1248.

[~~(c) In order for a child to be included in the registry, the following information must be available:~~]

[~~(1) the child's name, age or date of birth, and gender; and~~]

[~~(2) the blood lead level and test date.~~]

*§37.335. Persons Required to Report.*

(a) The following persons are required to report all blood lead results:

(1) (No change.)

(2) the person in charge of:

(A) - (B) (No change.)

(C) any [a] facility in which a laboratory conducts blood lead testing.

(b) (No change.)

*§37.336. Reporting Procedures.*

(a) The reporting physician, laboratory director, or alternate person as set forth in §37.335(b) of this title (relating to Persons Required to Report) shall make the report of the child [childhood] blood lead level results [in writing] to [the local health authority or] the [Texas] Department of State Health Services (department) immediately after receiving the blood lead test result. The [A local health authority or the] department may authorize one or more employees [under his or her supervision] to receive the report from the physician, laboratory director, or alternate person by telephone or fax. The [local health authority or the] department shall implement a method for verifying the identity of the telephone caller when that person is unfamiliar to the employee.

(b) [The local health authority shall collect the reports and transmit the information at weekly intervals to the Texas Department of Health, Bureau of Epidemiology.] Transmission also may be made by mail, courier, or electronic transfer.

(1) If by mail or courier, the reports shall be placed in a sealed envelope addressed to the attention of the [Texas] Department of State Health Services, Childhood Lead Poisoning Prevention Program [, Bureau of Epidemiology,] and marked "confidential medical records."

(2) (No change.)

[(c) When a child with a blood lead result resides outside the local health jurisdiction that received the report, the local health authority shall notify the appropriate local health authority or public health region where the child or children reside. The department shall assist the local health authority in providing such notifications if requested. The receiving local health authority shall collect the reports and transmit the information at weekly intervals to the department.]

(c) [(d)] Blood lead levels of 40 micrograms per deciliter or greater shall be reported immediately by fax or telephone to [the local health authority or] the department at (800) 588-1248 or fax to (512) 458-7699. Reports shall include all information as required on the Texas Child Blood Lead Level Report Form, Publication #F09-11709. The following information shall be reported:

(1) the child's name, address, date of birth or age, sex, race and ethnicity;

(2) the child's blood lead level concentration, test date, and name and telephone number of the testing laboratory;

(3) whether the sample is capillary or venous blood; and

(4) the name and city of the attending physician.

*§37.337. Department Rules for Follow-Up Care; Coordination of Care.*

(a) Health care providers should follow the department's Form Pb-109, Physician Reference on Follow-up Testing and Coordination of Care, which may be obtained from the department's website http://www.dshs.state.tx.us/lead or by calling 1-800-588-1248, and meets the federal requirements for the recommended schedule for:

(1) obtaining a confirmatory diagnostic venous blood lead test sample; and

(2) providing early and late follow-up care and other activities.

(b) Environmental lead investigation, shall comply with the department's eligibility criteria for environmental lead investigation as prescribed in §37.339(a) of this title (relating to Environmental Lead Investigations Procedures).

(c) The investigator shall provide guidance to parents, guardians, and consulting physicians from lead-risk assessment reports on how to eliminate or control lead exposures that may be contributing to the child's blood lead level.

*§37.338. Environmental Lead Investigations.*

(a) To be eligible for an environmental lead investigation, the child's elevated blood lead level(s) must meet the most recent criteria for environmental investigation issued by the Centers for Disease Control and Prevention of the United States Public Health Service.

(b) The request for an environmental lead investigation shall be on the department's most current form, Pb-101, Request for Environmental Lead Investigation or equivalent. A current version of form Pb-101 may be obtained from the department's website at http://www.dshs.state.tx.us/lead, or by calling 1-800-588-1248. The completed form should be sent by FAX, ATTENTION: Environmental Specialist, using the fax number on the form.

(c) On receiving a report of a child with a confirmed blood lead level warranting an environmental lead investigation, the department or its authorized agent may conduct an environmental lead investigation, using Form Pb-103 (Elevated Blood Lead Level Investigation Questionnaire) or its equivalent, of:

(1) the home environment in which the child resides, or other premises frequented by a child, if the department or the department's authorized agent obtains the written consent of an adult occupant;

(2) any child-care facility with which the child has regular contact and that may be contributing to the child's blood lead level, if the department or the department's authorized agent obtains the written consent of the owner, operator, or principal of the facility; and

(3) any child-occupied facility with which the child has regular contact and that may be contributing to the child's blood lead levels, if the department or the department's authorized agent obtains the written consent of:

(A) the owner, operator, or principal of the facility; or

(B) an adult occupant of the facility if the facility is subject to a lease agreement.

(d) Written consent shall be on the department's form or equivalent meeting the requirements of the Texas Health and Safety Code, §161.011, §161.0211, and §161.0212.

(e) The lead risk assessor shall provide documented evidence when applicable, of all attempts made to receive consent for environmental lead investigation as required by subsection (c) of this section.

(f) If consent is denied, the investigator shall document the reason and circumstance for the denial, and measures that should be taken to protect the health of the child.

(g) Written consent is not required for an investigation for a child with a blood lead level of at least 45 micrograms per deciliter if a good faith attempt to contact the person authorized to provide written consent under subsection (e) of this section has been unsuccessful.

*§37.339. Environmental Lead Investigations Procedures.*

(a) Eligibility Criteria for Environmental Lead Investigation.

(1) The eligibility criteria for an environmental lead investigation shall be as stated on the department's Form Pb-101, Request for Environmental Lead Investigation or equivalent.

(2) A city, health district, or local health department may conduct an environmental lead investigation using lower elevated blood lead results than those in paragraph (1) of this subsection.

(3) Before conducting the investigation, city, health district, or local health department will:

(A) inform the health care provider of the intent to conduct the investigation; and

(B) submit to the department the most current Form Pb-101, Request for Environmental Lead Investigation or equivalent.

(b) Requesting an Environmental Lead Investigation.

(1) The request for an environmental lead investigation shall be, completed in its entirety, on the department's most current form Pb-101, Request for Environmental Lead Investigation or equivalent.

(2) The following persons may request an environmental lead investigation for a child meeting criteria in subsection (a) of this section:

(A) the child's attending healthcare provider;

(B) a public health nurse;

(C) local health department staff;

(D) local Childhood Lead Poisoning Prevention Program staff; or

(E) designated Texas Childhood Lead Poisoning Prevention Program staff.

(3) An environmental lead investigation request may be denied by the department if the eligibility criteria is not met.

(4) The department will notify the requestor of the reason for such denial.

(c) Conducting and Reporting an Environmental Lead Investigation.

(1) Only a person currently certified by the State of Texas as a lead risk assessor shall conduct an environmental lead investigation.

(2) The lead risk assessor shall conduct the investigation in accordance with the conditions and requirements of the certification by the department.

(3) The lead risk assessor shall provide a written report of each completed environmental lead investigation to the provider; parent or guardian; and homeowner or property owner.

(A) The written report shall contain at least the following from the investigation:

*(i)* date lead risk assessment was performed;

*(ii)* address where lead risk assessment was performed;

*(iii)* name and address of property owner;

*(iv)* date structure or unit was built;

*(v)* name of lead risk assessor, certification number, or business affiliation of the person that conducted the investigation;

*(vi)* testing methods used (e.g. X-ray fluorescence (XRF), what samples were collected, and name of the accredited laboratory that analyzed samples);

*(vii)* a general statement of the results;

*(viii)* a description of recommended interim controls and/or abatement options for each identified lead-based paint hazard;

*(ix)* a suggested prioritization for taking each action based on the immediacy and severity of the hazard; and

*(x)* if the risk assessor is recommending use of an encapsulant or enclosure, the report shall include maintenance and monitoring schedule for the encapsulant or enclosure.

(B) If the parent or guardian is not the owner of the property investigated, and the risk-assessor discovered lead-based paint hazards on the property; the lead risk assessor shall inform the property owner about the investigation findings, recommendations, and their legal obligation to disclose the same to all future tenants and buyers.

(4) The lead risk assessor conducting the investigation shall send a complete copy of the environmental lead investigation report to the department's Texas Childhood Lead Poisoning Prevention Program. The report shall consist of the following:

(A) a copy of the summary report letter sent to the healthcare provider, the parent, or guardian, and to the property owner, if applicable;

(B) a completed form Pb-103 (Elevated Blood Lead Level Investigation Questionnaire) or its equivalent;

(C) signed consent forms or records of consent denials; and

(D) results of all environmental sampling and testing performed.

(5) Confidentiality. The report shall be confidential as provided by the Texas Health and Safety Code, §161.0213.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801123
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 458-7111 x6972

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## CHAPTER 129. OPTICIANS' REGISTRY

### 25 TAC §§129.1, 129.2, 129.4, 129.5, 129.7 - 129.13

*(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§129.1, 129.2,

129.4, 129.5 and 129.7 - 129.13, concerning the voluntary registration and regulation of opticians.

BACKGROUND AND PURPOSE

The proposed repeals are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 Texas Administrative Code (TAC), Chapter 140, Health Professions Regulation. The new rules transfer and update existing language, and do not impose any new requirements or fees on applicants or licensees. The new rules also clarify that one registration certificate, not two, will be issued to a dual registrant, and eliminate language permitting the "carryover" of hours from one continuing education period to the next.

SECTION-BY-SECTION SUMMARY

The repeal of §§129.1, 129.2, 129.4, 129.5 and 129.7 - 129.13 is necessary in order to combine the Professional Licensing and Certification Unit rules in one chapter, 25 TAC, Chapter 140, Health Professions Regulation.

FISCAL NOTE

Cindy Bourland, Manager, Professional Licensing and Certification Unit, has determined that for each year of the first five-year period that the sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Bourland has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This determination was made because the repeals do not impose any new requirements. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Bourland has also determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the voluntary registration and regulation of opticians.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the pubic health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Yvonne Feinleib, Program Director, Opticians Registry, Professional Licensing and Certification Unit, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 834-4521 or by email to Yvonne.Feinleib@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed repeals are authorized by Occupations Code, Chapter 352, which authorizes the adoption of rules regarding the regulation of opticians; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed repeals affect the Occupations Code, Chapter 352; Health and Safety Code, Chapter 1001; and Government Code, Chapter 531.

*§129.1. Purpose and Construction.*

*§129.2. Definitions.*

*§129.4. Fees.*

*§129.5. Application Procedures and Requirements for Registration.*

*§129.7. Issuance of Certificate of Registration.*

*§129.8. Renewal of Registration.*

*§129.9. Requirements for Continuing Education.*

*§129.10. Change of Name or Address.*

*§129.11. Violations, Complaints, Investigation of Complaints, and Disciplinary Actions.*

*§129.12. Registration of Applicants with Criminal Backgrounds.*

*§129.13. Professional and Ethical Standards.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801086
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 458-7111 x6972

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# CHAPTER 140. HEALTH PROFESSIONS REGULATION
# SUBCHAPTER G. OPTICIANS

**25 TAC §§140.275 - 140.285**

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes new §§140.275 - 140.285, concerning the voluntary registration and regulation of opticians.

BACKGROUND AND PURPOSE

The proposed repeal of 25 Texas Administrative Code (TAC), §§129.1, 129.2, 129.4, 129.5, and 129.7 - 129.13 is necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 Texas Administrative Code (TAC), Chapter 140, Health Professions Regulation. The new rules transfer and update existing language, and do not impose any new requirements or fees on applicants or licensees. The new rules also clarify that one registration certificate, not two, will be issued to a dual registrant, and eliminate language permitting the "carry-over" of hours from one continuing education period to the next.

SECTION-BY-SECTION SUMMARY

New §140.275 sets forth purpose and scope of the rules. New §140.276 includes definitions for terms used within the rules. New §140.277 lists the fees required for application, registration, renewal, and issuance of a duplicate certificate. New §140.278 describes application procedures and qualifications for registration as an optician. New §140.279 covers procedures related to the issuance of a certificate of registration, including duplicate certificates, titles, and expiration date of an initial certificate. New §140.280 sets forth information concerning registration renewal and late renewal, including renewal procedures for a registration on active military duty. New §140.281 sets forth continuing education requirements. New §140.282 sets forth procedures for a change of name or address. New §140.283 sets out violations, procedures concerning complaints and investigations, and actions the department may take against a person when violations have occurred. New §140.284 sets out the guidelines and criteria on the eligibility of persons with criminal backgrounds to obtain registration. New §140.285 details professional and ethical standards, including standards related to advertising by a registrant.

FISCAL NOTE

Cindy Bourland, Manager, Professional Licensing and Certification Unit, has determined that for each year of the first five-year period that the sections are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Bourland has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This determination was made because the new rules do not impose any new requirements. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Bourland has also determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to continue to ensure public health and safety through the voluntary registration and regulation of opticians.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the pubic health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Yvonne Feinleib, Program Director, Opticians Registry, Professional Licensing and Certification Unit, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 834-4521 or by email to Yvonne.Feinleib@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed new rules are authorized by Occupations Code, Chapter 352, which authorizes the adoption of rules regarding the regulation of opticians; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed new rules affect the Occupations Code, Chapter 352; Health and Safety Code, Chapter 1001; and Government Code, Chapter 531.

*§140.275. Purpose and Construction.*

(a) Purpose. This subchapter implements the provisions of the Opticians' Registry Act, Texas Occupations Code, Chapter 352, concerning the voluntary registration and regulation of dispensing opticians by providing a means by which the public can identify registered providers of ophthalmic dispensing services and products that meet minimum standards of competence.

(b) Construction. These sections cover definitions; fees; application procedures and requirements; issuance of a certificate of registration; renewal of registration; requirements for continuing education; changes of name or address; procedures for violations, complaints, investigation of complaints, and disciplinary actions; registration of applicants with criminal backgrounds; and professional and ethical standards.

*§140.276. Definitions.*

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Opticians' Registry Act (Act), Texas Occupations Code, Chapter 352.

(2) Applicant--A person who applies for registration under the Act.

(3) Commissioner--The commissioner of the Department of State Health Services.

(4) Consumer--An individual receiving services or obtaining a product from a registered dispensing optician.

(5) Contact lens dispensing--The fabrication, ordering, mechanical adjustment, dispensing, sale, and delivery to the consumer of contact lenses prescribed by and dispensed in accordance with a prescription from a licensed physician or optometrist, together with appropriate instructions for the care and handling of the lenses. The term does not include the taking of any measurements of the eye or the cornea or evaluating the physical fit of the contact lenses, unless that action is directed or approved by a licensed physician.

(6) Contact lens prescription--A written specification by a licensed physician or optometrist for therapeutic, corrective, or cosmetic contact lenses that states the refractive power of the product and other information as required by:

(A) the physician or the Texas Medical Board; or

(B) the optometrist or the Texas Optometry Board.

(7) Department--The Department of State Health Services.

(8) Dispensing optician--A person who provides or offers to provide spectacle or contact lens dispensing services or products to the public.

(9) Dual application--An application by one person as both a registered spectacle dispensing optician and a registered contact lens dispenser.

(10) Examination--A qualifying test administered to eligible applicants by the department or its designee.

(11) Executive Commissioner--The Executive Commissioner of the Health and Human Services Commission.

(12) Registered contact lens dispenser--A person properly registered under the Act as a contact lens dispenser.

(13) Registered spectacle dispensing optician--A person properly registered under the Act as a spectacle dispensing optician.

(14) Registration certificate--A document issued by the department to a qualified person authorizing that person to represent that he or she is registered under the Act.

(15) Spectacle dispensing--The design, verification, fitting, adjustment, sale, and delivery to the consumer of fabricated and finished spectacle lenses, frames, or other ophthalmic devices, other than contact lenses, prescribed by and dispensed in accordance with a prescription from a licensed physician or optometrist. The term includes:

(A) prescription analysis and interpretation;

(B) the taking of measurements of the face, including interpupillary distances, to determine the size, shape, and specification of the spectacle lenses or frames best suited to the wearer's needs;

(C) the preparation and delivery of work orders to laboratory technicians engaged in grinding lenses and fabricating spectacles;

(D) the verification of the quality of finished spectacle lenses;

(E) the adjustment of spectacle lenses or frames to the intended wearer's face; and

(F) the adjustment, repair, replacement, reproduction, or duplication of previously prepared spectacle lenses, frames, or other specially fabricated optical devices, other than contact lenses.

(16) Spectacle prescription--A written specification by a licensed physician or optometrist for therapeutic or corrective lenses that states the refractive power of the product and other information as required by the physician or optometrist.

*§140.277. Fees.*

(a) Schedule of fees. The fees are as follows:

(1) initial application and registration fee for a registration issued for two years--$100;

(2) initial dual application and registration fee for a registration issued for two years--$160;

(3) registration renewal fee;

(A) for a registration issued for two years--$100;

(B) for a retired optician registration issued for two years--$50;

(4) dual registration renewal fee;

(A) for a registration issued for two years--$160;

(B) for a retired optician registration issued for two years--$80;

(5) late registration fee--a fee that is one and one-half times the registration renewal fee if renewed within 90 days of expiration or a fee that is two times the registration renewal fee if renewed more than 90 days but less than one year after expiration;

(6) duplicate certificate fee--$20; and

(7) examination fee--the then current fee assessed by the Department of State Health Services' (department's) designee for the examination.

(b) Payment of fees. If paid by mail, all fees shall be submitted in the form of a personal check, certified check for guaranteed funds or a money order made payable to the Department of State Health Services. If submitted in person, cash may be accepted by the department's cashier.

(c) Nonrefundable fees. All fees submitted to the department are nonrefundable.

(d) For all applications and renewal applications, the department is authorized to collect fees to fund the Office of Patient Protection, Health Professions Council, as mandated by law.

(e) For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

*§140.278. Application Procedures and Requirements for Registration.*

(a) Purpose. The purpose of this section is to set out the application procedures and requirements for registration.

(b) General.

(1) Unless otherwise indicated, an applicant must submit all required information and documentation of credentials on official Department of State Health Services (department) forms.

(2) Applications may be submitted for registration as a registered contact lens dispenser, a registered spectacle dispensing optician, or both.

(3) The department will not consider an application as officially submitted until the applicant pays the application fee. The fee must accompany the application form.

(4) An application not completed within 30 days after the date of the department's notice of deficiency may be voided.

(c) Required application materials.

(1) The application form shall contain:

(A) specific information regarding personal data, social security number, birth month and day, place of employment, preferred mailing address and telephone number, other registrations and licenses held, misdemeanor and felony convictions, educational and training background, and work experience;

(B) a statement that the applicant has read the Opticians' Registry Act (Act) and this subchapter and agrees to abide by them;

(C) a statement that the applicant shall return to the department any registration certificate(s) or identification card(s) upon the expiration, revocation, or suspension of the registration;

(D) a statement that the applicant understands that fees submitted in the registration process are nonrefundable unless the processing time is exceeded without good cause as set out in subsection (f) of this section;

(E) a statement that the applicant understands that materials submitted in the registration process become the property of the department and are not returnable;

(F) a statement that the information in the application is truthful and that the applicant understands that providing false and misleading information on items which are material in determining the applicant's qualifications may result in the voiding of the application, the failure to be granted any registration, or the revocation of any registration issued;

(G) the signature of the applicant which has been dated; and

(H) a statement that if issued a registration certificate, the registrant shall keep the department advised of his or her current mailing address.

(2) An applicant shall submit documentation satisfactory to the department that he or she has completed five classroom hours.

(A) The hours must have been completed within three years prior to the date of the application.

(B) The hours must be offered or approved by the American Board of Opticianry or the National Contact Lens Examiners.

(C) If applying for dual registration, the applicant must have completed 10 classroom hours offered or approved by the American Board of Opticianry or the National Contact Lens Examiners.

(D) Documentation may include a transcript, diploma, certificate, or other official or certified document.

(3) Proof of having passed the prescribed examination shall be attached to the application form.

(d) Examinations.

(1) The examination administered by the American Board of Opticianry, or its successor, is the examination for registered spectacle dispensing opticians.

(2) The examination administered by the National Contact Lens Examiners, or its successor, is the examination for registered contact lens dispensers.

(e) Determining eligibility. The department shall receive and approve or disapprove all applications for registration as registered spectacle dispensing opticians or registered contact lens dispensers or both.

(1) Notices of application approval, disapproval or deficiency shall be in accordance with subsection (f) of this section.

(2) An application for a registration shall be disapproved if the applicant has:

(A) not met the requirements in this section;

(B) failed to or refused to properly complete or submit any application form, endorsement, or fee or deliberately presented false information on any form or document required by the department;

(C) violated any provision of the Act or this subchapter;

(D) been convicted of a felony or misdemeanor as set out in §140.284 of this title (relating to Registration of Applicants with Criminal Backgrounds); or

(E) violated any provision of state law relating to the practice of dispensing opticians.

(3) If after review, the department determines that the application should not be approved, the department shall give the applicant written notice of the reason for the proposed decision and of the opportunity for a formal hearing. The notice shall be in accordance with §140.283 of this title (relating to Violations, Complaints, Investigation of Complaints, and Disciplinary Actions).

(f) Application processing.

(1) Time periods. The department shall comply with the following procedures in processing applications for registration and renewal.

(A) The following periods of time shall apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and accepted for filing or that the application is deficient and additional specific information is required. A written notice stating that the application has been approved may be sent in lieu of the notice of acceptance of a complete application. The time periods are as follows:

*(i)* letter of acceptance of application for registration--20 working days;

*(ii)* letter of application or renewal deficiency--20 working days; and

*(iii)* issuance of registration renewal--10 working days.

(B) The following periods of time shall apply from the receipt of the last item necessary to complete the application until the date of issuance of written notice approving or denying the application. The time periods for denial include notification of the proposed decision and of the opportunity, if required, to show compliance with the law and of the opportunity for a formal hearing. An application is not considered complete until the required examination has been successfully completed by the applicant. The time periods are as follows:

*(i)* letter of approval for examination--20 working days;

*(ii)* initial letter of approval for registration--30 days;

*(iii)* letter of denial of registration--30 days; and

*(iv)* issuance of registration renewal--10 working days.

(2) Reimbursement of fees.

(A) In the event an application is not processed in the time periods stated in this subsection, the applicant has the right to request reimbursement of all fees paid in that particular application process. Application for reimbursement shall be made to the department. If the department does not agree that the time period has been violated or finds that good cause existed for exceeding the time period, the request will be denied.

(B) Good cause for exceeding the time period is considered to exist if the number of applications for registration and registration renewal exceeds by 15% or more the number of applications processed in the same calendar quarter the preceding year; another public or private entity relied upon by the department in the application process caused the delay; or any other condition exists giving the department good cause for exceeding the time period.

(3) Appeal. If a request for reimbursement is denied by the department, the applicant may appeal to the commissioner of the department for a timely resolution of any dispute arising from a violation of the time periods. The applicant shall give written notice to the commissioner at the address of the department that he or she requests full reimbursement of all fees paid because his or her application was not processed within the applicable time period. The department shall submit a written report of the facts related to the processing of the application and of any good cause for exceeding the applicable time period. The commissioner shall provide written notice of the commissioner's decision to the applicant. An appeal shall be decided in the applicant's favor if the applicable time period was exceeded and good cause was not established. If the appeal is decided in favor of the applicant, full reimbursement of all fees paid in that particular application process shall be made.

(4) Contested cases. The time periods for contested cases related to the denial of registration or registration renewals are not included within the time periods stated in this subsection. The time period for conducting a contested case hearing runs from the date the department receives a written request for a hearing and ends when the decision of the department is final and appealable. A hearing may be completed within one to four months, but may extend for a long period of time depending on the particular circumstances of the hearing.

*§140.279. Issuance of Certificate of Registration.*

(a) Issuance of certificate. The Department of State Health Services (department) shall issue a certificate of registration and a registration identification card containing a registration number and expiration date to each qualified applicant.

(b) Certificate and identification card. Any certificate of registration or identification card issued remains the property of the department and shall be surrendered on demand of the department.

(c) Display of certificate. The certificate shall be displayed in a prominent location in the primary office or place of employment of the registrant. A current identification card shall be carried by the registrant.

(d) Reproduced or altered certificates/cards. The certificate or identification card shall not be reproduced or altered in any manner.

(e) Duplicate replacement certificates. Duplicate replacement certificates will be issued by the department upon written request from a registrant and payment of the appropriate duplicate certificate fee. The request shall include a statement detailing the loss or destruction of the original certificate or identification card or be accompanied by the damaged certificate or card.

(f) Individual or dual registration. A certificate of registration shall be issued for a contact lens dispenser or a spectacle dispensing optician. In the event an individual is registered as a contact lens dispenser and a spectacle dispensing optician, he or she shall be issued one certificate which lists both titles.

(g) Titles.

(1) A registered spectacle dispensing optician may refer to himself or herself as a registered dispensing optician, a registered spectacle dispenser, or a registered spectacle dispensing optician.

(2) A registered contact lens dispenser may refer to himself or herself as a registered contact lens technician or a registered contact lens dispenser.

(3) A registrant may not use abbreviations or other letters to represent that the person is registered.

(h) Expiration of initial registration. The initial registration certificate is valid through the registrant's next birth month for a term of up to two years.

*§140.280. Renewal of Registration.*

(a) Purpose. The purpose of this section is to establish the rules governing renewal of registration certificates.

(b) General.

(1) When issued, a registration certificate is valid through the registrant's next birth month for a two-year term, as determined by the department.

(2) A registrant must renew the registration certificate in order to remain registered.

(3) Each registrant is responsible for renewing the registration certificate before the expiration date indicated on the face of the certificate and shall not be excused from paying the late registration fee. Failure to receive notification from the Department of State Health Services (department) prior to the expiration date of the registration certificate will not excuse failure to apply for renewal or late renewal.

(4) The department will not renew the registration of a registrant who is in violation of the Opticians' Registry Act (Act) or this subchapter at the time of application for renewal.

(5) The department shall not renew a registration if renewal is prohibited by the Education Code, §57.491 (relating to Loan Default Ground for Nonrenewal of Professional or Occupational License).

(6) The department shall not renew a registration if renewal is prohibited by a court order or attorney general's order issued pursuant to the Family Code, Chapter 232 (Suspension of License for Failure to Pay Child Support), as set out in §1.301 of this title (relating to Suspension of License for Failure To Pay Child Support).

(7) Notices of renewal approval, disapproval, or deficiency shall be in accordance with §140.278(f) of this title (relating to Application Procedures and Requirements for Registration).

(c) Registration renewal.

(1) At least 30 days prior to the expiration date of a person's registration, the department will send notice to the registrant at the address in the department's records of the expiration date of the registration and the total renewal fee, the continuing education report form, and the renewal form.

(2) The renewal form for each registrant shall require the provision of the preferred mailing address, primary employment address and telephone number, and a statement of all misdemeanor and felony offenses for which the registrant has been convicted.

(3) A registrant has submitted all renewal application materials when the registrant has mailed the renewal form, the required renewal fee, and the continuing education report form to the department prior to the expiration date of the registration. The postmark date shall be considered as the date of mailing.

(4) The department shall issue to a registrant who has met all requirements for renewal a renewed registration certificate and identification card.

(5) Each registrant is responsible for renewing the registration before the expiration date and shall not be excused from paying the late registration fee. Failure to receive notification from the department prior to the expiration date of the registration shall not excuse failure to apply for renewal or late renewal.

(d) Late renewal.

(1) The department shall inform a person who has not renewed a registration within 30 days following the expiration of the registration of the amount of the late registration fee required for renewal and the date the registration expired.

(2) A person whose registration has expired for not more than 90 days may renew the registration by submitting to the department the registration renewal form, the completed continuing education report form, and the late registration fee. A person whose registration has expired more than 90 days but less than one year may renew the registration by submitting to the department the registration renewal form, the completed continuing education report form, and a late registration fee.

(3) A person whose registration has been expired for more than one year may not renew. The person may obtain a new registration by complying with the then current requirements and procedures for obtaining a registration.

(4) If a registrant fails to timely renew his or her registration because the registrant is or was on active duty with the armed forces of the United States of America serving outside the State of Texas, the registrant may renew the registration pursuant to this paragraph.

(A) Renewal of the registration may be requested by the registrant, the registrant's spouse, or an individual having power of attorney from the registrant. The renewal form shall include a current address and telephone number for the individual requesting the renewal.

(B) Renewal may be requested before or after expiration of the registration.

(C) A copy of the official orders or other official military documentation showing that the registrant is or was on active duty serving outside the State of Texas shall be filed with the department along with the renewal form.

(D) A copy of the power of attorney from the registrant shall be filed with the department along with the renewal form if the individual having the power of attorney executes any of the documents required in this paragraph.

(E) A registrant renewing under this paragraph shall pay the renewal fee, but not the late registration fee.

(F) A registrant renewing under this paragraph shall not be required to submit any continuing education hours if continuing education is required to be shown for the renewal.

(e) Expiration of registration. A person whose registration has expired may not refer to himself or herself by any of the titles listed in §140.279(g) of this title (relating to Issuance of Certificate of Registration).

(f) A retired registrant who wishes to use the titles authorized by §140.279(g) of this title, only in the provision of voluntary charity care, may renew the registration every two years by submitting the renewal form and the retired optician registration renewal fee in accordance with the renewal procedures described in this section. Voluntary charity care means engaging in the practice of contact lens dispensing and/or spectacle dispensing at no cost to the consumer.

*§140.281. Requirements for Continuing Education.*

(a) Purpose. The purpose of this section is to establish the continuing education requirements a registrant shall meet to maintain registration. The requirements are intended to maintain and improve the quality of services provided to the public by registered spectacle dispensing opticians and registered contact lens dispensers. Continuing education credit includes programs beyond the basic preparation which are designed to promote and enrich knowledge, improve skills, and develop attitudes for the enhancement of dispensing opticians, thus improving health care to the public. The Department of State Health Services (department) assumes dispensing opticians will maintain the high standards of the profession in selecting quality educational programs to fulfill the continuing education requirements.

(b) Number of hours required. Proof of having earned ten contact hours of continuing education credit in each area for which the registrant is renewing shall be required at the time of renewal for each registration issued for a two-year term. A contact hour is 50 minutes.

(1) The hours must have been completed within 24 months prior to the date of expiration of a registration issued for a two-year term.

(2) For a registered spectacle dispensing optician the hours must be offered or approved by the American Board of Opticianry. For a registered contact lens dispenser the hours must be offered or approved by the National Contact Lens Examiners.

(3) If applying for dual registration renewal the applicant must have a total of 20 contact hours of continuing education for a

registration issued for a two-year term. Half of the contact hours must be offered or approved by the American Board of Opticianry and half of the contact hours must be offered or approved by the National Contact Lens Examiners.

(c) Records. The registrant shall be responsible for maintaining a record of his or her continuing education experiences. The certificates, diplomas, or other documentation verifying earning of the continuing education hours are not to be forwarded to the department at the time of renewal unless the registrant has been selected for audit by the department. Only the completed continuing education report form should accompany the renewal form and fee if the registrant has not been selected for audit.

(d) Audit process.

(1) The department shall select for audit a random sample of registrants for each renewal month. Audit forms shall be sent to the selected registrants at the time the renewal notice is mailed.

(2) All registrants selected for audit will furnish documentation such as official transcripts, certificates, diplomas, receipts, agendas, programs, or an affidavit identifying the continuing education experience satisfactory to the department, to verify proof of having earned the continuing education hours listed on the continuing education report form. The documentation must be provided at the time the renewal form is returned to the department.

(3) Failure to timely furnish this information or knowingly providing false information in the audit process or during the renewal process are grounds for suspension or revocation of the registration.

(e) Reduced hours required for retired opticians providing voluntary charity care. A retired registered optician renewing under §140.280(f) of this title (relating to Renewal of Registration) is required to complete one-half of the hours regularly required for registration renewal.

*§140.282. Change of Name or Address.*

(a) The purpose of this section is to set out the responsibilities and procedures for name and address changes.

(b) The registrant shall notify the Department of State Health Services (department) of changes in name, preferred mailing address, or place of business or employment within 30 days of such change.

(c) Before any new registration certificate or identification card will be issued by the department, notification of a name change must be forwarded to the department and shall include a copy of a marriage certificate, court decree evidencing such change, or a social security card reflecting the new name.

(d) The registrant shall return any previously issued certificate or identification card and remit the appropriate replacement fee as set out in §140.277 of this title (relating to Fees).

*§140.283. Violations, Complaints, Investigation of Complaints, and Disciplinary Actions.*

(a) Purpose. The purpose of this section is to set out:

(1) procedures concerning complaints alleging violations of the Act or this subchapter; and

(2) Department of State Health Services (department) actions against a person when violations have occurred.

(b) Compliance with the Act. A registrant or applicant must comply with the Act and this subchapter.

(c) Filing of complaints.

(1) Any person may complain to the department alleging that a registered dispensing optician or another person has violated the Act or this subchapter.

(2) A person wishing to file a complaint against a registered dispensing optician or another person shall notify the department. The initial notification of a complaint may be in writing, by telephone, or by personal visit to the department's office. The mailing address is Opticians' Registry, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3183.

(3) Upon receipt of a complaint, the department shall send to the complainant an acknowledgment letter and the department's complaint form, which the complainant must complete and return to the department before further action can be taken. If the complaint is made by a visit to the department's office, the form may be given to the complainant at that time; however, it must be completed and returned to the department before further action can be taken.

(4) Anonymous complaints may be accepted by the department if the complainant provides sufficient information.

(d) Investigation of complaints.

(1) The department may investigate any complaint.

(2) If the department determines that the complaint does not come within the department's jurisdiction, the department shall advise the complainant and, if possible, refer the complainant to the appropriate governmental agency for handling such a complaint.

(3) The department shall, at least as frequently as quarterly, notify the parties to the complaint of the status of the complaint until its final disposition.

(4) If the department determines that there are insufficient grounds to support the complaint, the department shall dismiss the complaint and give written notice of the dismissal to the registrant or person against whom the complaint has been filed and to the complainant.

(5) If the department determines that there are sufficient grounds to support the complaint, the department may propose to deny, suspend, revoke, probate, or not renew a registration.

(6) If an investigation is done, the investigator shall always attempt to contact the complainant to discuss the complaint.

(e) Disciplinary actions.

(1) The department may deny an application or registration renewal or suspend or revoke a registration or impose probation or administrative penalties for any violation of the Act or this subchapter.

(2) Prior to institution of formal proceedings to revoke or suspend a registration, the department shall give written notice to the registrant of the facts or conduct alleged to warrant revocation or suspension, and the registrant shall be given an opportunity, as described in the notice, to show compliance with all requirements of the Act and this subchapter.

(3) If denial, revocation, suspension, or probation of a registration is proposed, the department shall give written notice to the registrant or applicant that the applicant or registrant must request, in writing, a formal hearing within 10 days of receipt of the notice. The notice shall state the basis for the proposed action. Receipt of the notice is presumed to occur on the 10th day after the notice is mailed to the last address known to the department unless another date is reflected on a United States Postal Service return receipt.

(4) If no timely request for a hearing is received, the applicant or registrant is deemed to have waived the hearing and be in agreement with the allegations and proposed action.

(5) The formal hearing shall be conducted in accordance with the Administrative Procedure Act, Government Code, Chapter 2001 and §140.284 of this title (relating to Registration of Applicants With Criminal Backgrounds), if applicable.

(6) If the applicant or registrant fails to appear or be represented at the scheduled hearing, the person is deemed to be in agreement with the allegations and proposed action and to have waived the right to a hearing.

(7) If the hearing is waived, the application or registration shall be denied, suspended, revoked, or probated by an order of the commissioner of health.

(8) Administrative penalties shall be assessed in accordance with the procedures set forth in the Act, Subchapter G (relating to Administrative Penalty).

(f) Suspension, revocation, or denial of renewal.

(1) If the department suspends a registration, the suspension shall remain in effect until the department determines that the reason for suspension no longer exists or for the period of time stated in the order. The department shall investigate prior to making a determination.

(2) During the time of suspension, the suspended registrant shall return his or her registration certificate and identification card to the department.

(3) If a suspension overlaps a registration renewal date, the suspended registration holder may comply with the renewal procedures in this subchapter; however, the department may not renew the registration until the department determines that the reason for suspension no longer exists or the period of suspension is completed.

(4) If the department revokes or does not renew a registration, a person may reapply for a registration by complying with the requirements and procedures in this subchapter at the time of reapplication. The department may refuse to issue a registration if the reason for revocation or denial of renewal continues to exist.

(5) Upon revocation or denial of renewal, a registration holder shall return the registration certificate and identification card to the department.

(g) The department may impose an emergency suspension for a violation of the Act or this chapter in accordance with the procedures established in Occupations Code, §352.254.

*§140.284. Registration of Applicants with Criminal Backgrounds.*

(a) This section sets out the guidelines and criteria on the eligibility of persons with criminal backgrounds to obtain registration as spectacle dispensers or contact lens dispensers.

(b) Criminal convictions which directly relate to the occupation of dispensing opticians shall be considered by the Department of State Health Services (department) as follows.

(1) The department may suspend or revoke an existing registration or disqualify a person from receiving a registration because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities under that registration.

(2) In considering whether a criminal conviction directly relates, the department shall consider:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the purposes for requiring a registration as a spectacle dispensing optician or a contact lens dispenser;

(C) the extent to which a registration might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a registered spectacle dispensing optician or a registered contact lens dispenser.

(c) The following felonies and misdemeanors directly relate because these criminal offenses indicate an inability or an unwillingness for the person to be able to perform or to be fit for registration:

(1) the misdemeanor of violating the Opticians' Registry Act (Act);

(2) a conviction relating to deceptive business practices;

(3) a misdemeanor or felony offense involving moral turpitude;

(4) the misdemeanor of practicing medicine or optometry without a license;

(5) a misdemeanor or felony offense under various titles of the Texas Penal Code:

(A) Title 5 concerning offenses against the person;

(B) Title 7 concerning offenses against property;

(C) Title 9 concerning offenses against public order and decency;

(D) Title 10 concerning offenses against public health, safety, and morals; and

(E) Title 4 concerning offenses of attempting or conspiring to commit any of the offenses in this subsection; and

(6) other misdemeanors and felonies if disciplinary action by the department will promote the intent of the Act, this subchapter, and the Texas Occupations Code, Chapter 53.

*§140.285. Professional and Ethical Standards.*

(a) The purpose of this section is to establish the professional and ethical standards to be followed by a registered spectacle dispensing optician or a registered contact lens dispenser.

(b) A registrant shall not misrepresent any professional qualifications or credentials.

(c) A registrant shall not provide any information that is false, deceptive, or misleading to the Department of State Health Services (department).

(d) A registrant shall cooperate with the department by furnishing required documents or information and by responding to a request for information.

(e) A registrant shall not consume alcohol or take controlled substances not prescribed by a licensed physician during the hours the registrant is available to dispense spectacles or contact lenses.

(f) A registrant shall not use advertising that is false, misleading, or deceptive or that is not readily subject to verification.

(1) False, misleading, or deceptive advertising or advertising that is not readily subject to verification includes advertising that:

(A) makes a material misrepresentation of fact or omits a fact necessary to make the statement as a whole not materially misleading;

(B) makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;

(C) compares a health care professional's service with another health care professional's service unless the comparison can be factually substantiated;

(D) contains a testimonial;

(E) causes confusion or misunderstanding as to the credentials, education, or registration of a health care professional;

(F) advertises or represents that health care insurance deductibles or copayments may be waived or are not applicable to health care services to be provided if the deductible or copayments are required;

(G) advertises or represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or copayments are required;

(H) makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of patient; or

(I) advertises or represents in the use of professional name, a title or professional identification that is expressly or commonly reserved to or used by another profession or professional.

(2) A "health care professional" includes a dispensing optician or any other person licensed, certified, or registered by the state in a health-related profession.

(g) On the written request of a client, a client's guardian, or a client's parent if the client is a minor, a registrant shall provide, in plain language, a written explanation of the dispensing services previously made on a bill or statement for the client. This requirement applies even if the charges are to be paid by a third party.

(h) A registrant may not persistently or flagrantly overcharge or overtreat a client.

(i) A registrant shall make a reasonable attempt to notify each client of the name, mailing address, and telephone number of the department for the purpose of directing complaints to the department by providing notification:

(1) on each written contract for services of a registrant;

(2) on a sign prominently displayed in the primary place of business of each registrant; or

(3) in a bill for services provided by a registrant to a client or third party.

(j) A registrant shall be subject to disciplinary action by the department if under the Crime Victims Compensation Act, Texas Civil Statutes, Article 8309-1, the registrant is issued a public letter of reprimand, is assessed a civil penalty by a court, or has an administrative penalty imposed by the attorney general's office.

(k) Unless exempt, a registrant shall comply with the Texas Contact Lens Prescription Act, Texas Occupations Code, Chapter 353.

(l) A registrant may not sell, deliver, or dispense contact lenses to a patient or other consumer in this state unless the registrant receives or verifies a prescription that conforms to the requirements of the Texas Contact Lens Prescription Act, Texas Occupations Code, Chapter 353. The registrant must fill the prescription accurately without modification.

(m) Spectacles may be dispensed only in accordance with a spectacle prescription from a licensed physician or optometrist. This subsection does not prohibit a registrant from duplicating lenses.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801087
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 458-7111 x6972

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## SUBCHAPTER I. LICENSED CHEMICAL DEPENDENCY COUNSELORS

### 25 TAC §§140.400 - 140.430

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes new §§140.400 - 140.430, concerning the licensing and regulation of chemical dependency counselors.

BACKGROUND AND PURPOSE

The repeal of §§450.100 - 450.126 and new rules are necessary to implement amendments to Texas Occupations Code, Chapter 504, made by Senate Bill (SB) 155, which was adopted by the 80th Legislature, Regular Session, 2007. New and amended rule provisions implementing SB 155 include provisions relating to the approval of peer assistance programs, the certification of clinical supervisors, modifications to the continuing education requirement for renewal of the licensed chemical dependency counselor (LCDC) license, the recognition of other certifications on the LCDC license, and making all persons now licensed, registered, or certified under Texas Occupations Code, Chapter 504, subject to the same extent to disciplinary action and to the criminal history standards developed under that Chapter. The repeal and new rules also consolidate existing Professional Licensing and Certification Unit program rules into 25 Texas Administrative Code (TAC), Chapter 140, Health Professions Regulation.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001, (Administrative Procedure Act). Sections 450.100 - 450.126 have been reviewed and the department has determined that, except as amended under the proposed new rules, as further described in this preamble, the reasons for adopting the sections continue to exist because rules on this subject are needed. However, the department is proposing to repeal the existing sections and adopt the rules in 25 TAC, Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

In addition to the changes specifically outlined, the existing rules have been revised and reorganized as new rules in §§140.400 - 140.430 to ensure appropriate section, subsection, and paragraph organization and captioning; to ensure clarity; to improve spelling, grammar, and punctuation; to improve agency-wide consistency between programs, as appropriate; to ensure that the rules reflect current legal, policy, and operational considerations; to ensure accuracy of legal citations; to delete repetitive, obsolete, or unnecessary language; to improve draftsmanship; and to make the rules more accessible, understandable, and usable, to the extent possible. Additionally, provisions relating to definitions, complaints, and enforcement procedures were added to the subchapter as described below to consolidate the provisions relating to regulation and licensure under Texas Occupations Code, Chapter 504.

New §140.400 proposes a comprehensive list of definitions within the subchapter for terms used in the subchapter, including added definitions for certified clinical supervisor and peer assistance program, both new terms added to implement SB 155, and additions and modifications to other terms needed to update or clarify the meaning of terms used within the subchapter.

New §140.403 proposes to raise the renewal fee for licensed chemical dependency counselors to $115 biennially from $100 biennially. A new initial and renewal certification fee for certified clinical supervisor is proposed to be $20 biennially. These changes are calculated to allow the department to cover the costs of administering Texas Occupations Code, Chapter 504. The fee for replacement or duplicate certificates is proposed to be reduced to $10, instead of $25. In light of the low volume of requests for replacement or duplicate certificates and the consolidation of the LCDC licensing program with other professional licensing programs within the department, it is estimated that a $10 fee will be adequate to cover the costs of replacement or duplicate certificates.

New §140.408 proposes to add the requirement and applicable waiver provision mandated by SB 155 relating to access to a peer assistance program for an LCDC applicant.

New §140.409 proposes to add the option of certified clinical supervisors as a means to obtain supervised work experience, in order to implement SB 155.

New §140.410 proposes to add provision for closure of a CTI or surrender of a CTI registration in response to a complaint to be deemed to be the result of formal disciplinary action, consistent with new §140.428 of this title (Relating to Voluntary Surrender of License, Certification, or Registration In Response to a Complaint).

New §140.411 proposes to establish requirements and procedures relating to certification of clinical supervisors to implement SB 155.

New §140.415 proposes to allow for the affixing of certain approved adhesive labels to the LCDC license certificate to implement SB 155, and proposes to provide for voluntary relinquishment of a license other than in response to a complaint.

New §140.416 proposes to reduce the continuing education hours required for LCDC license renewal to implement SB 155. For license holders who hold a master's or more advanced degree, the requirement is 24 hours biennially. Other license holders must complete 40 hours biennially. The maximum number of continuing education hours that may be earned through teaching a course has been reduced in proportion to the reduction in the total number of required continuing education hours.

New §140.418 proposes procedures for continuing education audits of license holders, and omits the allowance for carry-over of continuing education hours.

New §140.420 proposes to implement SB 155 by establishing requirements and procedures for the approval of peer assistance programs to assist LCDCs whose ability to perform a professional service is impaired or likely to be impaired by abuse of or dependency on drugs or alcohol.

New §140.421 and §140.422 propose to incorporate the role of certified clinical supervisors into current standards for supervision and training of counselor interns. Section 140.421 proposes to require counselor intern supervision documentation to be maintained for five years, rather than four, consistent with the period of counselor intern registration.

New §140.423(a)(9) proposes to require that client records be maintained for at least five years, instead of six years.

New §§140.424 - 140.429 propose to establish, within the subchapter governing the licensing and regulation of LCDCs, rules governing complaints, investigations, disciplinary actions, administrative penalties, informal disposition of contested cases, voluntary license surrender, and contested case procedures, and to improve consistency of practice with other professional licensing programs within, or administratively attached to, the department under HB 2292, 78th Legislature, Regular Session, 2003, while remaining consistent with the requirements of Texas Occupations Code, Chapter 504. Administrative penalty ranges, based upon severity and repetition of violations, have been increased to promote this consistency and to allow the department greater latitude to determine appropriate penalties within statutory limits. In addition, consistent with SB 155, all persons now licensed, registered, or certified under Texas Occupations Code, Chapter 504, will be subject to the disciplinary provisions in this subchapter.

New §140.430 proposes criminal history standards equally applicable to all licensees, registrants, and certificate holders under Texas Occupations Code, Chapter 504, as provided for by SB 155.

FISCAL NOTE

Cindy Bourland, Manager, Professional Licensing and Certification Unit, has determined that for each year of the first five years the sections are in effect, there will be fiscal implications to the state as a result of enforcing or administering the sections as proposed. The effect on state government will be an increase in revenue to the state of $34,250 the first fiscal year and $34,250 each year for fiscal years two through five, based upon an increase in LCDC renewal fees, and based upon the addition of certification and renewal fees for Certified Clinical Supervisors. Given the historically low volume of requests for replacement certificates, any loss of revenue from the reduction in fees is not expected to significantly affect the estimated increases in revenue. Increased costs associated with the approval of peer assistance programs and the certification of clinical supervisors are expected to total $10,000 in the first fiscal year, $25,071 in the second fiscal year, $25,139 in the third fiscal year, $25,252 in the fourth fiscal year, and $25,368 in the fifth fiscal year. Implementation of the proposed sections will not result in any fiscal implications for local governments.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Bourland has also determined that there will be no adverse economic impact on small business or micro-businesses required to comply with the sections as proposed. This determination was made because the repeal and new rules do not impose any new requirements that impose a cost on small businesses, as defined by Government Code, §2006.001. Small and micro-businesses will not be required to alter their business practices in order to comply with the new rules.

There is anticipated economic cost to individuals who are required to comply with the sections as proposed. Each licensed chemical dependency counselor will be required to remit an additional $15 every two years in order to renew the counselor's license. The current biennial renewal fee is $100 and the proposed biennial renewal fee is $115. In addition, Certified Clinical Supervisors will be required to pay $20 initial and renewal certification fees and, if they have not previously paid that fee for LCDC licensure, a $40 background investigation fee.

There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Bourland has also determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to protect and promote public health, safety, and welfare, by regulating licensed chemical dependency counselors, certified clinical supervisors, clinical training institutions, and counselor interns. In addition, approved peer assistance programs provided for by the rules will encourage impaired counselors to obtain assistance for their impairment, and the availability of certified clinical supervisors will increase the training and supervision options for counselor interns and thereby facilitate the licensure of additional licensed chemical dependency counselors.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the pubic health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Stewart Myrick, Program Director, Licensed Chemical Dependency Counselor Program, Professional Licensing and Certification Unit, MC 1982, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, P.O. Box 149347, Austin, Texas 78756, (512) 834-4565, or by email to lcdc@dshs.state.tx.us. When submitting comments by e-mail, please indicate "Comments on Proposed Rules" in the subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed new rules are authorized by Texas Occupations Code, §504.051, which authorizes rulemaking necessary to carry out the duties established under Texas Occupations Code, Chapter 504, the establishment of standards of conduct and ethics for Chapter 504 licensees, and the establishment of additional criteria for peer assistance programs for chemical dependency counselors; Texas Occupations Code, §504.053, which authorizes the Executive Commissioner of the Health and Human Services Commission to set application, examination, license renewal, and other fees in amounts sufficient to cover the costs of administering Chapter 504; and by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed new rules affect the Texas Occupations Code, Chapter 504; Health and Safety Code, Chapter 1001; and Government Code, Chapter 531. Review of the rules implements Government Code, §2001.039.

*§140.400. Definitions.*

Notwithstanding the provisions of §441.101 of this title (relating to Definitions), the following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Abuse--An intentional, knowing, or reckless act or omission by a counselor, applicant for counselor licensure, counselor intern, certified clinical supervisor, clinical training institution, or personnel of any such person that causes or may cause death, emotional harm or physical injury to a client. Abuse includes, without limitation, the following:

(A) any sexual contact, sexual exploitation, or indecent exposure between a counselor, applicant for counselor licensure, counselor intern, certified clinical supervisor, clinical training institution, or personnel of any such person, and a client, or as otherwise defined in this section;

(B) corporal punishment or physical assault;

(C) nutritional deprivation or sleep deprivation;

(D) efforts to cause fear;

(E) the use of any form of communication to threaten, curse, shame, or degrade a client;

(F) restraint that does not conform with Chapter 448 of this title (relating to Standard of Care);

(G) coercive or restrictive actions taken in response to a client's request for discharge or refusal of medication or treatment that are illegal or not justified by the client's condition; and

(H) any other act or omission classified as abuse by Texas law, including, but not limited to, Texas Family Code, §261.001 and Texas Human Resources Code, §48.002.

(2) Accredited institution of higher education--An institution that holds accreditation or candidacy status from an accreditation organization recognized by the Council for Higher Education Accreditation.

(3) Act--Texas Occupations Code, Chapter 504, Chemical Dependency Counselors.

(4) Administrative Hearing--A contested case hearing conducted by the State Office of Administrative Hearings (SOAH) under Texas Government Code, Chapter 2001, Administrative Procedure Act.

(5) Administrative Law Judge--An individual appointed by the chief administrative law judge of SOAH under Texas Government Code, §2003.041, to preside over a contested case proceeding.

(6) Administrative Procedure Act (APA)--Texas Government Code, Chapter 2001, as amended.

(7) Adolescent--An individual 13 through 17 years of age whose disabilities of minority have not been removed by marriage or judicial decree.

(8) Adult--An individual 18 years of age or older, or an individual under the age of 18 whose disabilities of minority have been removed by marriage or judicial decree.

(9) Advanced Practice Nurse --A registered nurse currently licensed in Texas who is approved by the Texas Board of Nurse Examiners to engage in advanced practice.

(10) Applicant--A person who has submitted an application for an initial, or for the renewal of, a license, certification, or registration.

(11) Assessment--An ongoing process through which the counselor collaborates with the client and others to gather and interpret information necessary for developing and revising a treatment plan and evaluating client progress toward achievement of goals identified in the treatment plan, resulting in comprehensive identification of the client's strengths, weaknesses, and problems/needs.

(12) Career School or College--An organization approved and regulated by the Texas Workforce Commission, pursuant to Title 40, Texas Administrative Code, Chapter 807 (relating to Career Schools and Colleges), that offers a course of study in chemical dependency counseling.

(13) Certified Clinical Supervisor (CCS)--A person certified by the department pursuant to Texas Occupations Code §504.1521 (relating to Supervised Work Experience).

(14) Chemical Dependency Treatment (treatment)--A planned, structured, and organized chemical dependency program designed to initiate and promote a person's chemical-free status or to maintain the person free of illegal drugs. It includes, but is not limited to, the application of planned procedures to identify and change patterns of behavior related to or resulting from substance-related disorders that are maladaptive, destructive, or injurious to health, or to restore appropriate levels of physical, psychological, or social functioning.

(15) Child--For purposes of reporting abuse and neglect, a child is an individual under the age of 18 whose disabilities of minority have not been removed by marriage or judicial decree. For all other purposes in these rules, child shall mean an individual under the age of 13.

(16) Client--An individual who receives or has received services, including admission authorization or assessment or referral, from a chemical dependency counselor, counselor intern, applicant for licensure as a counselor, certified clinical supervisor, clinical training institution, or from a person for whom the counselor, intern, certified clinical supervisor or applicant is working on a paid or voluntary basis, or was working at the time the individual was a client.

(17) Clinical Training Institution (CTI)--An individual or legal entity registered with the department to supervise a counselor intern.

(18) Counselor--A licensed chemical dependency counselor.

(19) Counselor Intern (CI or intern)--A person seeking a license as a chemical dependency counselor who is registered with the department and pursuing a course of training in chemical dependency counseling at a registered clinical training institution or under the supervision of a certified clinical supervisor.

(20) CSAT--Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, United States Department of Health and Human Services.

(21) Diagnostic and Statistical Manual of Mental Disorders (DSM)--The Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. Any reference to DSM shall constitute a reference to the most recent edition published.

(22) Department--The Department of State Health Services.

(23) Exploitation--The illegal or improper use of a client, or the client's resources, for monetary or personal benefit, profit, or gain by a counselor, counselor intern, or applicant for counselor licensure, or any other act or omission classified as exploitation by Texas law including, but not limited to, Texas Family Code, §261.001 and Texas Human Resources Code, §48.002. Exploitation includes, but is not limited to, sexual exploitation, as defined herein.

(24) Graduate--An individual who has successfully completed, or been exempted from, as applicable, the 270 hours of education, 300 hour practicum, and 4,000 hours of supervised work experience and who is still registered with the department as a counselor intern.

(25) Hearing--Administrative Hearing.

(26) Indecent Exposure--Exposure by a chemical dependency counselor, counselor intern, certified clinical supervisor, applicant for any such license, or personnel of a clinical training institution or other licensee, of the individual's anus or any part of the individual's genitals, knowing a client is present; or compulsion or encouragement by a chemical dependency counselor, counselor intern, certified clinical supervisor, applicant for any such license, or personnel of a clinical training institution or other licensee, for a client to expose the client's anus or any part of the client's genitals.

(27) Knowledge, Skills, and Attitudes (KSAs)--The knowledge, skills, and attitudes of addictions counseling as defined by CSAT Technical Assistance Publication (TAP 21) "Addictions Counseling Competencies: the Knowledge, Skills, and Attitudes of Professional Practice."

(28) License--Unless otherwise specified explicitly or by the context, any form of licensure issued under this subchapter, including a CI registration, CCS certification, CTI registration, or licensed chemical dependency counselor license.

(29) Licensed Chemical Dependency Counselor (LCDC)--A counselor licensed by the department, pursuant to Texas Occupations Code, Chapter 504, to engage in the practice of chemical dependency counseling.

(30) Licensee--Unless otherwise specified explicitly or by the context, any holder of a license issued under this subchapter, including the holder of a CI registration, CCS certification, CTI registration, or LCDC license

(31) Neglect--A negligent act or omission by a counselor, applicant for counselor licensure, counselor intern, certified clinical supervisor, clinical training institution, or personnel of any such person that causes or may cause death, physical injury, or substantial emotional harm to a participant or client. Examples of neglect include, but are not limited to:

(A) failure to provide adequate nutrition, clothing, or health care;

(B) failure to provide a safe environment free from abuse;

(C) failure to maintain adequate numbers of appropriately trained staff;

(D) failure to establish or carry out an appropriate individualized treatment plan; and

(E) any other act or omission classified as neglect by the Texas law including, but not limited to, Texas Family Code, §261.001 and Texas Human Resources Code, §48.002.

(32) Peer Assistance Program--a program approved by the department pursuant to Texas Occupations Code, §504.057 (relating to Approval of Peer Assistance Programs).

(33) Person--an individual, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity.

(34) Practice of Chemical Dependency Counseling--Providing or offering to provide chemical dependency counseling services involving the application of the principles, methods, and procedures of the chemical dependency counseling profession, as defined by the practice dimensions and competencies identified and described in the CSAT Technical Assistance Publication (TAP 21) "Addictions Counseling Competencies: the Knowledge, Skills, and Attitudes of Professional Practice."

(35) Prevention--A proactive process that uses multiple strategies to preclude the illegal use of alcohol, tobacco and other drugs and to foster safe, healthy, drug-free environments.

(36) Private Practice--The individual practice of a private, licensed chemical dependency counselor who personally renders individual or group services within the scope of the LCDC's license and in the LCDC's offices. To qualify to be engaged in private practice, the individual LCDC must not hold him/herself out as an organized program, or a part thereof, that provides counseling or treatment. This definition does not prohibit the sharing of office space or administrative support staff.

(37) Qualified Credentialed Counselor (QCC)--A licensed chemical dependency counselor or one of the practitioners listed below who is licensed and in good standing in the State of Texas, to the extent that such individual is acting within the authorized scope of the individual's license, including:

(A) licensed professional counselor (LPC);

(B) licensed clinical social worker (LCSW);

(C) licensed marriage and family therapist (LMFT);

(D) licensed psychologist;

(E) licensed physician;

(F) licensed physician's assistant;

(G) certified addictions registered nurse (CARN); or

(H) advanced practice nurse recognized by the Board of Nurse Examiners as a clinical nurse specialist or practitioner with a specialty in psychiatric-mental health nursing.

(38) Referral--The process of identifying appropriate services and providing the information and assistance needed to access them.

(39) Rules--An agency statement of general applicability, including a state rule or federal regulation, that implements or prescribes law or policy by defining general standards of conduct, rights, or obligations of persons, or describes the procedure or practice requirements that prescribe the manner in which public business before an agency may be initiated, scheduled, or conducted, or interprets or clarifies law or agency policy. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of the agency that does not affect private rights or procedures. Any reference to a rule shall mean the rule then in effect and as amended, unless otherwise specified.

(40) Screening--The process through which qualified staff, client, and available significant others, as appropriate, determine the most appropriate initial course of action, given the individual's needs and characteristics and the available resources within the community. In a treatment program, screening includes determining whether an individual is appropriate and eligible for admission to a particular program.

(41) Services--Substance abuse services.

(42) Sexual contact--Any intentional touching, or request to be allowed to touch, by a chemical dependency counselor, counselor intern, certified clinical supervisor, applicant for any such license, or personnel of a clinical training institution or other licensee, including touching through clothing, of the anus, breast, or any part of the genitals of a client; any intentional touching of any part of the body of a client, or request to be allowed to touch, including touching through clothing, with the anus, breast, or any part of the genitals of a chemical dependency counselor, counselor intern, certified clinical supervisor, applicant for any such license, or personnel of a clinical training institution or other licensee; or any compulsion or encouragement by a chemical dependency counselor, counselor intern, certified clinical supervisor, clinical training institution, applicant for any such license, or personnel of such licensee, for a client to engage in touching through clothing, of the anus, breast, or any part of the genitals of another individual, or for a client to touch any part of the body of another individual with the anus, breast, or any part of the client's genitals.

(43) Sexual Exploitation--A pattern, practice, or scheme of conduct by a chemical dependency counselor, counselor intern, certified clinical supervisor, clinical training institution, applicant for any such license, or personnel of any such person, that involves a client and can reasonably be construed as being for the purpose of sexual arousal or gratification or sexual abuse. It may include, without limitation, sexual contact, a request for sexual contact, or a representation that sexual contact or exploitation is consistent with, a part of, or a condition of receiving services. It is not a defense to sexual exploitation of a client if it occurs:

(A) with the actual or perceived consent of the client;

(B) outside of the delivery of services;

(C) off of the premises used for the delivery of substance abuse services; or

(D) after the client has stopped receiving services, where the conduct occurs within two years of when the client stopped receiving services.

(44) State Office of Administrative Hearings (SOAH)--The agency to which contested cases are referred by the department.

(45) Substance Abuse--A maladaptive pattern of substance use leading to clinically significant impairment or distress, as defined by the most recently published version of the DSM.

(46) Substance Abuse Education--A planned, structured presentation of information provided by qualified staff, related to substance abuse or substance dependence, allowing for discussion of the material presented, and relevant to the client's goals.

(47) Substance Abuse Services (Services)--A comprehensive term intended to describe activities undertaken to address any substance-related disorder as well as education and prevention activities. The term includes, without limitation, the provision of screening, assessment, referral, chemical dependency treatment, and chemical dependency counseling.

(48) Treatment Plan--An individualized, written plan developed and implemented through a collaborative process between qualified personnel and the client and reflecting and identifying desired treatment outcomes and the strategies for achieving them. At a minimum, the treatment plan addresses the identified substance use disorder(s), as well as issues related to treatment progress, including relationships with family and significant others, employment, education, spirituality, health concerns, and legal needs.

(49) Unethical Conduct--Conduct prohibited by the ethical standards adopted by state or national professional organizations or by rules established by a profession's state licensing agency.

*§140.401. License Required.*

(a) An individual identified to the public as a chemical dependency counselor must be licensed or exempt under this subchapter. Except as provided by this section, individuals who are not LCDCs shall not:

(1) offer or provide chemical dependency counseling services other than education;

(2) represent themselves as chemical dependency counselors; or

(3) use any name, title, or designation that implies licensure as a chemical dependency counselor.

(b) The following individuals are exempt from LCDC licensure requirements when they offer or provide chemical dependency counseling services within the scope of their authorized duties and scope of practice:

(1) counselors employed by federal institutions;

(2) school counselors certified by the Texas Education Agency;

(3) to the extent such licensees are acting within the authorized scope of their respective licenses, licensed physicians, licensed psychologists, licensed professional counselors (LPC), licensed marriage and family therapists (LMFT), and licensed social workers;

(4) religious leaders of congregations providing pastoral counseling within the scope of their congregational duties and people who are working for or providing counseling with a program exempted under Texas Health and Safety Code, §§464.051 - 464.061 (relating to Faith-Based Chemical Dependency Treatment Programs);

(5) students who are participating in a practicum that meets the requirements as set forth in §140.407 of this title (relating to Practicum Standards) as part of a supervised course of clinical training at a regionally accredited institution of higher education or a career school or college, as long as they do not hold themselves out as, or use any name, title, or designation that implies licensure as a chemical dependency counselor or registration under this subchapter as a counselor intern.

(c) Residents of other states are exempt from the LCDC licensure requirements of this subchapter if they:

(1) are legally authorized to provide chemical dependency counseling in those states; and

(2) do not offer or provide chemical dependency counseling in Texas for more than 30 days in any 12-month period.

(d) An individual who qualifies for an exemption but chooses to obtain an LCDC license from the department under this subchapter is subject to the same rules and disciplinary actions as other licensees.

*§140.402. Scope of Practice.*

(a) An LCDC is licensed to provide chemical dependency counseling services involving the application of the principles, methods, and procedures of the chemical dependency profession as defined by the profession's ethical standards and the KSAs as defined in §140.400 of this title (relating to Definitions). The license does not qualify an individual to provide services outside this scope of practice.

(b) The scope of practice for an LCDC includes services that address substance abuse/dependence and/or its impact on the service recipient subject to the following:

(1) the LCDC is prohibited from using techniques that exceed his or her professional competence;

(2) the service recipient may only be the user, family member or any other individual involved in a significant relationship with a user;

(3) LCDCs may diagnose substance disorders, but anything other than a mental health diagnostic impression must be determined by a qualified professional; and

(4) LCDCs are not qualified to treat individuals with a mental health disorder or provide family counseling to individuals whose presenting problems do not include chemical dependency.

*§140.403. Fees.*

(a) The schedule of fees is:

(1) initial LCDC application fee--$25, in addition to any fees assessed under subsection (e) of this section;

(2) initial LCDC licensure fee--$75;

(3) LCDC renewal and renewal application fee--$115, in addition to any fees assessed under subsection (e) of this section;

(A) late renewal penalty fee (up to 90 days after the license expiration date)--$37.50;

(B) late renewal penalty fee (between 91 days and one year after the license expiration date)--$75;

(4) background investigation fee--$40;

(5) inactive status fee--$50;

(6) licensure certificate replacement or duplication fee--$10;

(7) returned check fee--$25;

(8) clinical supervisor initial and renewal application and certification fee--$20.

(b) The department may contract or enter into a memorandum of understanding with a person to administer the LCDC licensure examination, and the fee charged by that person is subject to change. The current fee shall be printed in the examination registration form. Examination fees shall be paid directly to the contract organization administering the examination.

(c) Licensure fees paid to the department are not refundable.

(d) Fees shall be paid in full with a personal check, cashier's check, commercial check, or money order.

(e) For all new and renewal applications, the department is authorized to collect subscription and convenience fees in amounts determined by the Texas Online Authority to recover costs associated with new and renewal application processing through Texas Online. The fees may be paid with a credit card when applying for or renewing a license online.

*§140.404. LCDC Licensure Application Standards and Counselor Intern Registration.*

(a) Every individual seeking LCDC licensure shall apply for registration as a counselor intern and initiate the licensure application process with the department by submitting the following items in a form acceptable to the department:

(1) the initial LCDC application fee and the background investigation fee;

(2) the department's current application form that has been completed, signed, dated, and notarized;

(3) a recent full-face wallet-sized photograph of the applicant;

(4) two sets of fingerprints completed according to department instructions on cards issued by the department; and

(5) documentation that the applicant has successfully completed intern registration requirements in §140.405 of this title (relating to Requirements for Counselor Intern Registration).

(b) A licensure or counselor intern registration applicant shall:

(1) read the department rules in this subchapter;

(2) follow all laws and rules, including the ethical standards;

(3) provide to the department, or give the department permission to request from third parties, any additional information or references needed or requested by the department; and

(4) notify the department in writing within 30 days of a change in name, address, or telephone number.

(c) Application materials become the property of the department.

(d) No determination will be made on an application unless it is complete.

(1) Incomplete documents will be returned to the sender. The department will hold the remaining documents, but will not take action on the application until all outstanding documents have been completed as required by the department.

(2) The application and background fee is not refundable and will not be returned. When resubmitting documents that were returned to the sender as incomplete, a second application fee is not required.

(e) A document may be considered incomplete if it does not conform to the following standards.

(1) All documents must be complete, signed, and dated. Signatures shall include credentials. If the documentation relates to past activity, the date of the activity shall also be recorded.

(2) Documentation shall be permanent and legible.

(3) When it is necessary to correct a document, the error shall be marked through with a single line, dated, and initialed by the writer. Correction fluid shall not be used.

(f) An applicant for CI registration must receive written notice of registration from the department before accumulating any supervised work, holding oneself out as a registered counselor intern, taking the licensure examination, or providing chemical dependency services supervised in accordance with the requirements of this subchapter.

(g) Within 45 days of receipt of the application, the department will notify the applicant that the application is complete or specify the additional information required.

(h) An application shall be voided after one year if the applicant has not provided the additional information necessary to process the application.

(i) By signing the application, the applicant accepts responsibility for remaining knowledgeable of and abiding by the applicable rules of this subchapter, including revisions.

*§140.405. Requirements for Counselor Intern Registration.*

(a) To be eligible for counselor intern registration under this subchapter, an individual must:

(1) be at least 18 years of age;

(2) have a high school diploma or its equivalent;

(3) successfully complete 270 classroom hours of chemical dependency curricula as described in §140.406 of this title (relating to Standards for 270 Educational Hours);

(4) complete 300 hours of approved supervised field work practicum as described in §140.407 of this title (relating to Practicum Standards);

(5) pass the criminal history standards described in §140.430 of this title (relating to Criminal History Standards);

(6) sign a written agreement to abide by the ethical standards contained in §140.423 of this title (relating to Professional and Ethical Standards); and

(7) be worthy of the public trust and confidence as determined by the department.

(b) Applicants holding at least a baccalaureate degree in chemical dependency counseling, sociology, psychology, or any other degree approved by the department are exempt from the 270 hours of education and the 300 hour practicum. The applicant must submit an official college transcript with the official seal of the college and the signature of the registrar. Degree programs approved by the department include baccalaureate, masters, or doctoral degrees with a course of study in human behavior/development and service delivery.

*§140.406. Standards for 270 Educational Hours.*

(a) At least 135 (nine semester hours) of the education hours must be specific to substance use disorders and their treatment. The remaining 135 hours may be specific or related to chemical dependency counseling. Related education hours may include courses in psychology, upper division sociology, counseling, mental health, behavioral science, psychiatric nursing, ethics, and rehabilitation counseling.

(b) The education shall be provided by a career school or college, or an accredited institution of higher education.

(c) Continuing education and extended learning courses offered by institutions of higher education are not acceptable unless the curriculum follows the Workforce Education Course Manual and meets the standards equivalent to a credit course.

(d) Educational hours obtained at a career school or college must follow the curriculum for Transdisciplinary Foundations outlined in the KSAs:

(1) Understanding Addiction;

(2) Treatment Knowledge;

(3) Application to Practice; and

(4) Professional Readiness.

(e) The department will not accept hours unless documented with a passing grade on an official transcript from the school. The applicant shall submit additional information requested by the department if needed to verify the content of a course.

*§140.407. Practicum Standards.*

(a) The practicum shall be completed under the administration of a career school or college or an accredited institution of higher education.

(b) The applicant must complete the practicum under the administration of a single school.

(c) The department will not accept a practicum without an official transcript from the school and a letter from the school's educational coordinator or chair verifying that the practicum was completed in the field of substance abuse.

(d) Practicum hours may be paid or voluntary.

(e) The practicum shall be delivered according to a written training curriculum that provides the student with an orientation to treatment services and exposure to treatment activities in each of the KSA dimensions. The practicum must include the intern observing treatment delivery and the intern providing services under direct observation. The practicum shall include at least 20 hours of experience in each of the KSA dimensions.

(f) All practicum training shall be provided by qualified credentialed counselors (QCCs).

*§140.408. Requirements for LCDC Licensure.*

(a) To be eligible for, and to complete an initial application for, a chemical dependency counselor license under this subchapter, an individual must:

(1) complete the application required under §140.404 of this title (relating to LCDC Licensure Application Standards and Counselor Intern Registration);

(2) meet the requirements to be a counselor intern in §140.405 of this title (relating to Requirements for Counselor Intern Registration);

(3) hold an associate degree or more advanced degree with a course of study in human behavior/development and service delivery, with the exception of:

(A) those applicants who were registered as a counselor intern based upon an application submitted to the department by September 1, 2004; and

(B) those LCDCs who are renewing an existing license.

(4) complete 4,000 hours of approved supervised experience working with chemically dependent individuals as described in §140.409 of this title (relating to Standards for Supervised Work Experience);

(5) pass the written chemical dependency counselor examination approved by the department;

(6) submit an acceptable written case presentation to the test administrator;

(7) pass an oral chemical dependency counselor examination approved by the department;

(8) submit two letters of recommendation from LCDCs;

(9) submit written assurance that the individual has access to an approved peer assistance program. The department may waive this requirement if the department determines, based upon information submitted by the applicant sufficient to support the determination, that a peer assistance program is not reasonably available to the individual; and

(10) pay the initial LCDC licensure fee.

(b) The department may waive the 4,000 hours of supervised work experience for individuals who hold a masters or doctoral degree in social work, or a masters or doctoral degree in a counseling-related field with 48 semester hours of graduate-level courses. Counseling-related degrees shall be reviewed on a case-by-case basis. An applicant for waiver shall submit an official college transcript with the official seal of the college and the signature of the registrar, and any other related documentation requested by the department.

*§140.409. Standards for Supervised Work Experience.*

(a) An LCDC applicant must be registered with the department as described in §140.404 and §140.405 of this title (relating to LCDC Licensure Application Standards and Counselor Intern Registration, and Requirements for Counselor Intern Registration) before accumulating supervised work experience.

(b) All supervised work experience obtained in Texas and all chemical dependency counseling services offered or provided by a CI must be completed at a registered CTI or under the supervision of a CCS. The department will not accept hours from an unregistered CTI or from a CCS that has not been certified by the department.

(c) Work experience must be documented on the department's supervised work experience documentation form and signed by a CTI coordinator or a CCS.

(1) All hours included in the documented supervised work experience must be performed within the KSA dimensions and in compliance with the Professional and Ethical Standards set forth in §140.423 of this title (relating to Professional and Ethical Standards).

(2) The supervised work experience form must be accompanied by the counselor intern's job description reflecting duties in the KSA dimensions.

(d) Out-of-state work experience will be accepted only if the following conditions are met.

(1) The applicant is either certified or licensed or in the process of seeking licensure or certification in the other state.

(2) The standards for clinical supervision of work experience must meet or exceed Texas standards and be outlined in the governing agency's rules or standards. A copy of the governing rules or standards must be submitted with the other required documentation of supervised work experience.

(3) The supervised work experience must be documented on the department's supervised work experience form or a comparable form used by the governing agency of the other state.

(e) Supervised work experience may be paid or voluntary.

(f) An individual who has completed the 4,000 hours of supervised work experience and is currently eligible to take or retake the examination is a graduate intern and may continue to provide chemical dependency services under the auspices of a registered clinical training institution or a certified clinical supervisor during the five-year registration period.

(g) It is the applicant's responsibility to verify the CTI or CCS holds a valid registration or certification issued by the department.

(h) The department may refuse to accept supervised work experience hours submitted to the department that relate to a violation of the Act or this subchapter for which final disciplinary action has been taken against the CI or the CI's registration under this subchapter.

*§140.410. Clinical Training Institution (CTI) Registration.*

(a) To become a registered clinical training institution (CTI), a person shall:

(1) provide activities in an array of the KSA dimensions, including assessment and counseling;

(2) serve a predominantly substance-abusing population;

(3) employ a full time QCC as the CTI coordinator;

(4) be in good standing, with no pending disciplinary actions, with applicable licensing and regulatory agencies;

(5) agree to comply with applicable rules in this subchapter; and

(6) submit a complete application.

(b) The program shall receive the registration and training program number before training begins. Approval allows the CTI to provide clinical training at any of its programs or sites with relevant services.

(c) The approval is valid for two years. The CTI shall reapply every two years by submitting a completed application form. The department may mail a courtesy notice, but it is the program's responsibility to reapply at least 45 days before the expiration date.

(d) The CTI shall notify the department in writing within 30 days of the following changes:

(1) a change in the CTI coordinator;

(2) a change in the CTI's name, mailing address, or telephone number; and

(3) closure of the CTI. The CTI shall return its registration with its notice of closure. Closure of the CTI and/or surrender of a CTI's registration in response to a complaint shall be deemed to be the result of formal disciplinary action, as described in §140.428 of this title (relating to Voluntary Surrender of License, Certification, or Registration In Response to a Complaint).

*§140.411. Certified Clinical Supervisor (CCS) Certification Requirements.*

(a) To become a certified clinical supervisor, an individual shall:

(1) be a QCC, as set forth in §140.400 of this title (relating to Definitions), in good standing, with no active suspension or probated suspension in effect against the individual's license, and no unpaid administrative penalties;

(2) submit verification of current certification as a clinical supervisor issued by the International Certification and Reciprocity Consortium or one of its member boards;

(3) submit a plan of activities, to be implemented for any CI the CCS supervises, in an array of the KSA dimensions, including assessment and counseling;

(4) serve a predominantly substance-abusing population;

(5) submit a completed application;

(6) submit two sets of fingerprints completed according to department instructions, if the individual has not previously submitted fingerprints for the purposes of licensure under this subchapter, and pass the criminal history standards described in §140.430 of this title (relating to Criminal History Standards);

(7) pay the background investigation fee, if the individual has not previously paid this fee for the purposes of licensure under this subchapter; and

(8) pay the application fee.

(b) If the individual is licensed as a chemical dependency counselor, then the certification as a clinical supervisor will expire on the same day as the license. If the individual is not licensed as a chemical dependency counselor, then the certification as a clinical supervisor will expire on the second anniversary of the last day of the month of issuance.

(c) An individual may renew this certification by submitting the items as described in subsection (a) of this section.

*§140.412. LCDC Licensure Examination.*

(a) To be eligible for the LCDC licensure examination, an applicant shall:

(1) be registered with the department as a counselor intern;

(2) submit an acceptable case study to the test administrator; and

(3) pay the examination fee to the test administrator.

(b) All required documentation and fees must be submitted to the test administrator by the specified deadlines. It is the applicant's responsibility to obtain testing information.

(c) An applicant may only take each portion of the examination four times, and all testing must be completed within five years from the date of registration.

*§140.413. Counselor Intern Registration Expiration.*

If an applicant does not complete one or more of the requirements for licensure as set forth in §140.408 of this title (relating to Requirements for LCDC Licensure) within five years from the date of registration, the registration will expire and the department will not issue a license.

(1) An individual whose application to become an LCDC has been finally denied is no longer registered as a graduate or counselor intern and cannot offer or provide chemical dependency counseling services as a CI or graduate CI.

(2) An individual whose CI registration has expired under this section may reapply for CI registration and licensure only after completing 24 semester hours of course work, pre-approved by the department, at a career school or college or an institution of higher education. The new application, which must be submitted within five years of the date of expiration of the individual's CI registration, shall not be considered complete without an official college transcript documenting the required coursework, a subsequent registration application form, and the initial LCDC application fee.

(3) If the department grants the new application for CI registration and permits the individual to reapply for LCDC licensure under the preceding paragraph, the individual must complete the remaining requirements for licensure and may take the failed portion(s) of the examination only an additional three times. The provisions in §140.408(a)(3)(A) of this title shall not apply. The outstanding requirements for licensure must be completed within three years of the new date of registration. During this period, the applicant may provide chemical dependency counseling services as a counselor intern in accordance with the supervision requirements of this subchapter.

*§140.414. LCDC Licensure Through Reciprocity.*

(a) An individual licensed or certified in another state as a chemical dependency counselor may apply for licensure as an LCDC through reciprocity by submitting:

(1) a copy of the reciprocal license or certification, with verified information from the issuing authority as to any disciplinary history;

(2) the department's current reciprocity application, which has been completed, signed, dated, and notarized;

(3) two sets of fingerprints on cards issued by the department;

(4) a recent full-face wallet-sized photograph of the applicant;

(5) two letters of recommendation; and

(6) the application fee and the background investigation fee;

(7) proof of successful completion of a licensing examination approved by the department; and

(8) an official transcript showing that the individual holds an associate degree or more advanced degree with a course of study in human behavior/development and service delivery.

(b) The applicant shall meet the criminal history standards described in §140.430 of this title (relating to Criminal History Standards).

(c) The department will not issue a license based on reciprocity unless it finds that the licensing or certification standards of the state of origin are at least substantially equivalent to the requirements for licensure of the Act and this subchapter. A state that does not require successful completion of a licensing examination approved by the department or a degree, as set forth in subsection (a) of this section, does not have standards that are substantially equivalent to the requirements for licensure under the Act and this subchapter. Any applicant for reciprocity that has not successfully completed a licensure examination approved by the department or a degree that satisfies subsection (a) of this section shall be required to do so as a prerequisite to eligibility for a license based upon reciprocity.

(d) An applicant who does not qualify for reciprocity may apply for licensure based upon the standards set forth in §140.408 of this title.

*§140.415. Issuing Licenses.*

(a) Absent action by the department against the applicant under §140.425 of this title (relating to Disciplinary Actions), the department will issue the applicable form of license under this subchapter when the applicant has met all requirements and paid any required fee for the license.

(b) All licensees under this subchapter shall keep current versions of the certificate of licensure and the department's public complaint notice containing the current name, mailing address, and telephone number for the department, and a statement that a complaint against a licensee under this subchapter may be directed to the department, prominently displayed in their place of business. LCDCs may apply an adhesive label issued by the Texas Certification Board of Addiction Professionals with the designation and expiration date of any other related certification held by the license holder that is approved by the International Certification and Reciprocity Consortium or another person approved by the department.

(c) A licensee shall not duplicate a licensure certificate to obtain a second copy of the license. A licensee may obtain an official duplicate certificate from the department by submitting a written request and the fee specified in §140.403 of this title (relating to Fees).

(d) The department will replace a lost or damaged certificate if the licensee provides:

(1) the remnants of the original licensure certificate (if damaged);

(2) the original licensure certificate and copy of legal documents (for a name change);

(3) the original licensure certificate (for printing error); or

(4) a notarized statement if the licensure certificate has been lost, stolen, or destroyed.

(e) A license replaced because of a printing error or mail damage will be replaced without cost, but all other replacements of licensure certificates require a fee, as specified in §140.403 of this title.

(f) LCDCs and CCSs shall notify the department in writing within 30 days of a change in name, address, or telephone number.

(g) The licensee shall return the original licensure certificate if it is relinquished, suspended, revoked, or voluntarily surrendered.

(h) All licensees shall remain knowledgeable of and abide by applicable statutes and rules and their amendments.

(i) A licensee may at any time voluntarily offer to relinquish his or her license for any reason, without compulsion.

(1) The original licensure certificate may be delivered to the department by hand or postal delivery.

(2) If there is no complaint pending against the licensee, the department may accept the relinquishment and void the applicable license.

(3) If a complaint is pending, the procedures for acceptance of a license surrender are set out in §140.428 of this title (relating to Voluntary Surrender of License, Certification, or Registration In Response to a Complaint).

(4) A license that has been surrendered and accepted may not be reinstated. However, a person may apply for a new license in accordance with the Act and this subchapter.

*§140.416. LCDC License Expiration, Renewal, and Continuing Education Requirements.*

(a) An LCDC license issued under this subchapter is valid until the expiration date printed on the license, which is calculated on a two-year renewal cycle from the date of original licensure. The licensee is responsible for renewing the license in a timely manner. The department will send the licensee a renewal notice, but failure to receive notice from the department does not waive or extend renewal deadlines.

(b) To renew a license, the LCDC shall:

(1) send a complete renewal application to the department;

(2) pay the renewal and renewal application fees as set forth in §140.403 of this title (relating to Fees);

(3) meet the criminal history standards described in §140.430 of this title (relating to Criminal History Standards); and

(4) complete all required continuing education as described in §140.418 of this title (relating to Continuing Education Standards).

(c) An LCDC who is otherwise eligible to renew a license may renew an unexpired license by submitting a complete renewal application and paying the required renewal fee to the department before the expiration date of the license. The renewal application and fee must be postmarked on or before the expiration date.

(d) If the LCDC's license has been expired for 90 days or less, the person may renew the license by paying to the department a fee in an amount equal to one and one-half times the required renewal fee.

(e) If the LCDC's license has been expired for more than 90 days but less than one year, the person may renew the license by paying to the department a fee in an amount equal to two times the required renewal fee.

(f) If the LCDC's license has been expired for one year or more, the person may not renew the license. The LCDC may obtain a new license by submitting to reexamination and complying, under current standards, with the requirements and procedures for obtaining an initial license.

(g) Notwithstanding in subsection (f) of this section, the department may renew an LCDC license that has been expired for one or more years without reexamination if the applicant was licensed in this state, moved to another state, and is currently licensed as an LCDC and in good standing in that state, with no pending disciplinary actions or active sanctions against the license or LCDC, and has been in practice in the other state for the two years preceding the date the person applies for renewal. The person must pay to the department a fee in an amount equal to two times the required renewal fee for the license.

(h) An LCDC whose license has expired cannot offer or provide chemical dependency counseling services as defined by the KSAs or represent himself or herself as an LCDC.

(i) An LCDC who holds a master's degree or more advanced degree shall complete at least 24 hours of continuing education during each two-year licensure period. The 24 hours of education must include the specific courses required in subsection (k) of this section and, if applicable, in subsection (l) of this section.

(j) An LCDC who does not meet the criteria in subsection (i) of this section must complete at least 40 hours of continuing education. The 40 hours of education must include the specific courses required in subsection (k) of this section and, if applicable, in subsection (l) of this section.

(k) Continuing education hours must include at least three hours of ethics training and a total of at least six hours of training in HIV, Hepatitis C, and sexually transmitted diseases.

(l) If an individual's job duties include clinical supervision, required hours of continuing education must include three hours of clinical supervision training.

(m) An LCDC who teaches a qualifying continuing education course shall receive the same number of hours as students attending the course. Only one set of hours can be accrued for a single curriculum, and no more than one half of the required amount of hours of continuing education as set forth in subsections (i) and (j) of this section shall be granted for courses taught by the LCDC.

*§140.417. Active Military Duty.*

If an LCDC, CI, or CCS fails to timely renew his or her license because the licensee is called to or is on active duty with the armed forces of the United States, or ordered by proper authority to active duty, outside the state of Texas, the licensee or the licensee's authorized representative may request an additional amount of time, equal to the total amount of time on active duty, for the licensee to complete any continuing education or other renewal requirements. A written request for an extension of time to complete renewal requirements under this section must be received by the department by no later than 60 days after the licensee is discharged from active duty, but, whenever possible, shall be submitted before the commencement of active duty or the scheduled expiration of the applicable license.

(1) If the request is made by the licensee's authorized representative, the request shall include a copy of the appropriate power of attorney or written evidence of a spousal relationship.

(2) The written request shall include a copy of the official transfer orders of the licensee or other official military documentation showing that the licensee is called to or on active duty. The licensee shall also provide documentation of the date of discharge from active duty, either with the written request or upon discharge, whichever is later.

(3) If a timely request is made in accordance with this section, the department will exempt the licensee from payment of the late renewal fee.

(4) The written request shall include a current address and telephone number for the licensee or the licensee's authorized representative.

(5) A person eligible for an extension of time to complete renewal requirements under this section for a license issued under this subchapter may not provide services to which the applicable license under this subchapter applies after the regularly scheduled expiration of that person's license until such time, if any, as the licensee completes renewal of the license in accordance with this subsection.

*§140.418. Continuing Education Standards.*

(a) The department will accept continuing education (CE) hours that meet the criteria in this section. Hours that do not meet these criteria may be evaluated on a case-by-case basis.

(b) Subject to department review, the department will accept continuing education credits approved by:

(1) recognized state boards, including, but not limited to the Texas State Board of Social Work Examiners, the Texas State Board of Examiners of Marriage and Family Therapists, and the Texas State Board of Examiners of Professional Counselors;

(2) the National Association of Alcohol and Drug Abuse Counselors; and

(3) the Texas Certification Board for Addiction Professionals.

(c) All continuing education hours must be specific to substance use disorders and their treatment, or related to chemical dependency counseling, as defined by the KSA dimensions. Related education hours may include psychology, sociology, counseling, mental health, behavioral science, psychiatric nursing, ethics, and rehabilitation counseling.

(d) For LCDCs who live out of state, the department will also accept continuing education hours approved by other state or federal agencies.

(e) The department will monitor an LCDC's compliance with continuing education requirements by the use of random audit. Licensees will be notified in writing if they have been selected for a continuing education audit. Individual supporting documents of participation in continuing education courses are not to be submitted to the department unless written notification of an audit is received informing the licensee that he or she has been randomly selected for a document audit. Upon receipt of written notification of an audit, the licensee shall submit all appropriate documentation to substantiate compliance with the continuing education and documentation requirements as set forth in this section and §140.416 of this title (relating to LCDC License Expiration, Renewal and Continuing Education Requirements).

(f) Continuing education certificates must contain:

(1) applicant's name and license number;

(2) date the continuing education hours were completed;

(3) number of hours assigned to each course;

(4) course title;

(5) educational provider name and, if applicable, number;

(6) approving agency or entity's name; and

(7) name and signature of instructor or coordinator.

(g) The department will accept education hours from an accredited college or university.

(1) College transcripts must contain the official seal of the college and the signature of the registrar.

(2) One semester hour of college credit is equivalent to 15 continuing education hours. One quarter hour of college credit is equivalent to 10 continuing education hours.

(h) Independent study or distance learning courses must be guided and monitored by the instructor and include an evaluation of performance and/or participation verification. In addition, the course must be structured so that students have access to faculty or instructors for questions and assistance in the completion of such course work.

*§140.419. Inactive Status.*

(a) An LCDC may request to have his or her license placed on inactive status by submitting a written request and paying the inactive fee before the license expires. Inactive status shall not be granted unless the license is current and in good standing.

(b) A person on inactive status cannot perform activities outlined in the KSA dimensions, represent himself or herself as an LCDC, or act in the capacity of a QCC. A person is subject to investigation and enforcement action during the period of inactive status.

(c) Inactive status shall not exceed two years and is not renewable.

(d) To return to active status, the person shall submit a written request to reactivate the license, a completed renewal application form, the renewal application fee and the license renewal fee, and documentation of 20 hours of continuing education obtained within the inactive status period. The continuing education shall include the courses described in §140.416(k) of this title (relating to LCDC License Expiration, Renewal, and Continuing Education Requirements).

(e) An inactive license will automatically expire at the end of the two-year inactive period. Renewal of an expired inactive license shall be subject to the provisions set forth in §504.203 of the Act (relating to License Renewal).

*§140.420. Peer Assistance Programs.*

(a) The department may issue or renew, as applicable, an LCDC license to an individual convicted or placed on community supervision in any jurisdiction for a drug or alcohol offense described in §140.430 (relating to Criminal History Standards) if the department determines that the applicant has successfully completed participation in an approved peer assistance program.

(b) Peer assistance programs shall identify, assist, and monitor participating LCDCs whose ability to perform a professional service is impaired or likely to be impaired by abuse of or dependency on drugs or alcohol, so that the individuals may return to safe practice. An LCDC who meet the standard for participation shall be referred to in this section as an "impaired professional." Peer assistance programs offer support and assistance and have a rehabilitative emphasis rather than a disciplinary emphasis.

(c) To become an approved peer assistance program, a professional association shall:

(1) submit an application form prescribed by the department;

(2) submit a written description of the peer assistance program that includes:

(A) goals and objectives, including criteria for successful completion of the peer assistance program;

(B) target population;

(C) the plan for ensuring services are available throughout the state;

(D) how the following areas are to be addressed:

*(i)* identification of and intervention with impaired professionals;

*(ii)* assistance with accessing quality treatment;

*(iii)* monitoring, support, and evaluation of participants;

*(iv)* intervention in crises, including relapses; and

*(v)* support during the reentry by participants to professional practice or instructional roles.

(E) staffing plans, minimum staff qualifications by position, and planned staffing levels relative to numbers of participants.

(F) the plan for program quality assurance and self-evaluation; and

(G) the methods that will be utilized to promote and encourage use of the program.

(3) meet the minimum criteria established for peer assistance programs under Texas Health and Safety Code, Chapter 467 and Chapter 451 of this title, as well as any additional criteria set forth in this section and in Texas Occupations Code §504.057 for peer assistance programs for LCDCs. Each peer assistance program will remain subject to and comply with these provisions once approved. In the

event of direct conflict between any of the provisions, the provisions of Texas Occupations Code, §504.057 and this section shall govern.

(d) Approval of the peer assistance program shall expire on the second anniversary of the date of approval. To renew the approval status, a professional association shall submit the materials as outlined in subsection (c) of this section.

(e) The peer assistance program shall comply with applicable Federal and State confidentiality laws and regulations, including, without limitation, Code of Federal Regulations, Title 42, Part 2 (relating to Confidentiality of Alcohol and Drug Abuse Patient Records) and Texas Health and Safety Code, Chapter 611 (relating to Mental Health Records).

(f) The peer assistance program shall notify the department, and, if required by Texas Health and Safety Code, §467.005 (relating to Reports), the person who made the report of the impaired professional to the peer assistance program, if the impaired individual fails to participate in the applicable program as required by the department.

(g) An impaired professional who is reported to a peer assistance program by the department or another third party shall, as a condition of participation in the program, give consent to the program that, at a minimum, authorizes the program to disclose the impaired person's failure to successfully complete the program to the department, and, as necessary for the peer assistance program to comply with its notification requirements, to the person who reported the impaired professional to the program.

(h) The department may revoke its approval of a program established by a professional association under this chapter, after a right to a fair hearing in accordance with §§1.41, 1.51 - 1.55 of this title (relating to Fair Hearing Procedures), if the authority determines that:

(1) the program does not comply with the criteria established by the department; and

(2) the professional association does not bring the program into compliance within a reasonable time, as determined by the department.

*§140.421. Standards for the Training and Supervision of Counselor Interns.*

(a) A CTI shall appoint a single training coordinator who is a qualified credentialed counselor (QCC). The CTI coordinator or a CCS shall oversee all training activities and ensure compliance with department requirements and rules relating to the training and supervision of CIs.

(b) The CTI or CCS shall establish acceptance criteria for CIs. No applicant shall be accepted to a CTI or accepted for CCS supervision without:

(1) documentation that the applicant is registered as a counselor intern with the department; and

(2) a signed ethics agreement that is consistent with the Professional and Ethical Standards in §140.423 of this title (relating to Professional and Ethical Standards).

(c) The CTI or CCS shall establish the following level system to classify counselor interns according to hours of supervised work experience:

(1) Level I: 0-1,000 hours of work experience;

(2) Level II: 1,001-2000 hours of work experience;

(3) Level III: 2,001-4,000 hours of work experience; and

(4) Graduate Status: over 4,000 hours of work experience.

(d) The CTI or CCS shall have a supervision structure that includes all intern levels. The CTI or CCS shall designate each intern's level in writing and provide the intern with a copy of the documentation.

(e) All counselor interns at a CTI must be under the direct supervision of a QCC as described in §140.422 of this title (relating to Direct Supervision of Interns). A CCS must directly supervise a counselor intern under the CCS's supervision, as described in §140.422 of this title.

(f) The CTI or CCS shall provide each Level I, II, and III intern with reading assignments and training activities for the supervised work experience that includes material in each KSA dimension.

(g) The CTI or CCS shall use the department's KSA evaluation tool to structure the intern's 4,000 hours of supervised work experience. The CI's supervising QCC, under the oversight and monitoring of the CTI coordinator, shall perform the CTI's responsibilities in the following paragraphs of this subsection.

(1) The CCS or CTI shall set weekly objectives with the CI based on areas targeted for improvement.

(2) The CCS or CTI shall provide the CI reading, computer, and/or video assignments that address areas needing improvement. The CTI or CCS shall allow the intern two hours per month to complete these assignments.

(3) The CCS or CTI shall monitor the intern's progress and provide verbal and written feedback during weekly supervision meetings.

(4) The intern shall complete a written KSA self-evaluation during the first 50 hours of work experience.

(5) The CCS or the CTI and the intern shall complete and discuss a written KSA evaluation at the completion of each level of experience (after 1,000 hours, 2,000 hours, and 4,000 hours).

(h) The CTI or CCS shall not allow a Level I, II, or III intern to accrue more than 40 hours of work experience per week.

(i) A graduate intern may continue to provide chemical dependency counseling services at a registered clinical training institution or with a CCS during that individual's maximum CI registration period.

(j) The CTI coordinator or CCS shall send the following documents directly to the department and provide the intern with copies within ten working days from the date the intern completes the required 4,000 hours or leaves the agency:

(1) the department's supervised work experience documentation form, fully completed and signed by the CCS or the CI's supervising QCC and the CTI Coordinator; and

(2) a copy of the intern's job description showing job responsibilities within the KSAs.

(k) All activities counted towards the intern's supervised work experience shall be within the scope of chemical dependency counseling services as defined by the KSAs.

(l) The CTI or CCS shall not approve hours for which the intern fails to substantially complete related activities and supervision assignments. Any failure to complete assignments shall be documented on the weekly supervision form.

(m) The CTI or CCS shall give each CI the department's CTI and CCS Assessment Form with instructions to complete the assessment and mail it directly to the department.

(n) The CTI or CCS shall use current department forms for all training and supervision documentation mandated by the department.

(o) The CTI shall ensure that each CTI coordinator and supervising QCC obtains three hours of continuing education in clinical supervision every two years.

(p) The CTI or CCS shall inform interns of licensure examination requirements and procedures, as well as examination schedules and information provided by the department.

(q) The CTI or CCS shall ensure that interns designate their status by using "counselor intern," "intern" or "CI" when signing client record entries, and that only registered CIs use this designation.

(r) The CTI or CCS shall maintain a complete file for each counselor intern for five years from the end of the CI's employment with a CTI or supervision by a CCS, as applicable, to include:

(1) letter of registration;

(2) ethics agreement signed by the intern;

(3) copies of KSA evaluations;

(4) documentation of all supervision activities;

(5) documentation of intern levels and accumulated hours at each level; and

(6) copy of the supervised work experience documentation form.

(s) The CTI or CCS shall give the intern a copy of all information contained in the intern file when the intern completes the required supervised work experience and/or leaves the agency.

*§140.422. Direct Supervision of Interns.*

(a) Direct supervision is oversight and direction of a counselor intern by a CCS, or either the CTI coordinator or the intern's supervising QCC at a CTI, which complies with the provisions in this section. Nothing in this section or subchapter shall be construed to authorize the provision of chemical dependency treatment without a license, where a license is required under Texas Health and Safety Code, Chapter 464 and Chapter 448 of this title.

(b) The CCS, or the CTI coordinator and the intern's supervising QCC at a CTI, shall assume responsibility for the actions of the intern within the scope of the intern's clinical training.

(c) If the intern has less than 2,000 hours of supervised work experience, the supervisor must be on site when the intern is providing services. If the intern has at least 2,000 hours of documented supervised work experience, the supervisor may be on site or immediately accessible by telephone.

(d) During an intern's first 1,000 hours of supervised work experience (Level I), the CCS, or the CTI coordinator or intern's supervising QCC at a CTI, shall:

(1) be on duty at the program site where the intern is working;

(2) observe and document the intern performing assigned activities at least once every two weeks (or at least once every 80 hours of the CI's work schedule);

(3) provide and document one hour of face-to-face individual or group supervision each week; and

(4) sign off on all clinical assessments, treatment plans, and discharge summaries completed by the intern.

(e) During an intern's second 1,000 hours of supervised work experience (Level II), the CCS, or the CTI coordinator or intern's supervising QCC at a CTI, shall:

(1) be on duty at the program site where the intern is working;

(2) observe and document the intern performing assigned activities at least once every month (or at least once every 160 hours of the CI's work schedule);

(3) provide and document one hour of face-to-face individual or group supervision each week; and

(4) sign off on all clinical assessments, treatment plans, and discharge summaries completed by the intern.

(f) An individual who has successfully completed the verbal and written portions of the licensing examination may be supervised in accordance with Level III standards set forth in subsection (g) of this section, but is still required to complete 4,000 hours of supervised work experience before achieving graduate status in the absence of a waiver under §140.408 of this title (relating to Requirements for LCDC Licensure).

(g) During an intern's last 2,000 hours of required supervised work experience (Level III), the CCS, or the CTI coordinator or intern's supervising QCC at a CTI, shall:

(1) be available by phone while the intern is working;

(2) observe and document the intern performing assigned activities as determined necessary by the CTI coordinator or CCS;

(3) provide and document one hour of face-to-face individual or group supervision each week; and

(4) sign off on all clinical assessments, treatment plans, and discharge summaries completed by the intern.

(h) After an intern achieves graduate status, the CCS, or the CTI coordinator or intern's supervising QCC at a CTI, shall:

(1) be available by phone while the graduate intern is working;

(2) provide and document one hour of face-to-face individual or group supervision each week; and

(3) sign off on all clinical assessments, treatment plans, and discharge summaries completed by the graduate intern.

(i) A supervisor must provide, at a minimum, an average of two hours of supervision-related activity per week per intern.

*§140.423. Professional and Ethical Standards.*

(a) This subsection applies to counseling records of a LCDC's private practice. Documentation of professional services rendered in another setting shall be created and maintained in accordance with any legal requirements for documentation applicable to the particular setting in which they were provided.

(1) The counselor shall establish and maintain a record for every client at the time of initial service delivery. The client record shall include:

(A) client identifying information;

(B) assessment results, including a statement of the client's problems and/or diagnosis;

(C) plan of care;

(D) documentation of all services provided, including date, duration, and method of delivery; and

(E) a description of the client's status at the time services are discontinued.

(2) The counselor shall maintain a record of all charges billed and all payments received.

(3) All entries shall be permanent, legible, accurate, and completed in a timely manner.

(4) All documents and entries shall be dated and authenticated. Authentication of electronic records shall be by a digital authentication key.

(5) When it is necessary to correct a record, the error shall be marked through with a single line, dated, and initialed by the counselor.

(6) The counselor shall protect all client records and other client-identifying information from destruction, loss, tampering, and unauthorized access, use or disclosure. Electronic client information shall be protected to the same degree as paper records and shall have a reliable backup system.

(7) The counselor shall comply with all applicable state and federal laws relating to confidentiality, including the requirements of Texas Health and Safety Code, Chapter 611 (relating to Mental Health Records) and Code of Federal Regulations, Title 42, Part 2 (relating to Confidentiality of Alcohol and Drug Abuse Patient Records).

(8) The counselor shall not deny clients access to the content of their records except as provided by law, including Texas Health and Safety Code, §611.0045 (relating to Right to Mental Health Record).

(9) Client records shall be kept for at least five years. Records of adolescent clients shall be kept for at least five years after the client becomes eighteen years of age.

(b) This subsection applies to an LCDC in private practice using the internet or telephone to provide chemical dependency counseling services.

(1) The counselor must reside in and perform the services from Texas.

(2) The department maintains its authority to regulate the counselor regardless of the location of the client.

(3) The counselor is subject to the applicable laws of other states and countries where the client may reside or receive services by electronic means. Such laws may limit the counselor's practice.

(4) The counselor's provision of services by electronic medium must comply with Code of Federal Regulations, Title 42, Part 2 (relating to Confidentiality of Alcohol and Drug Abuse Patient Records), Texas Health and Safety Code, Chapter 611 (relating to Mental Health Records), and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), as applicable.

(5) The counselor must be able to verify the identification of the client and ensure the client's appropriate age.

(6) If a counselor uses the Internet as the electronic means by which counseling is provided or transfers data through the Internet, the counselor must comply with the following:

(A) data may only be transferred using at least a 128-encryption;

(B) e-mail communication is restricted relating to client information and documentation; and

(C) the counselor must provide technical backup for system problems by providing a phone number to the client to call for technical support and a contingency plan for the client when a technical problem occurs.

(7) The counselor must provide services using audio or video in real time.

(8) The counselor must provide a description of all services offered to the client in writing and describe who is appropriate for the services. The description must include:

(A) a grievance procedure and provide a link to the department for filing a complaint when using the Internet and the toll-free number for the department when counseling by telephone;

(B) the counselor's credentials, education level, and training;

(C) a link to the licensure verification page when using the Internet and the toll-free number for the department when counseling by telephone;

(D) the difference between electronic counseling and traditional counseling; and

(E) the potential risk regarding clinical issues, security and confidentiality.

(9) Services may only be offered by licensed chemical dependency counselors.

(10) The counselor must provide an emergency contact person and phone number and emergency procedures to the client in writing.

(c) This subsection applies to any person licensed, certified, or registered under this subchapter.

(1) A licensee shall not discriminate against any client or other person on the basis of gender, race, religion, age, national origin, disability, sexual orientation, or economic condition.

(2) A licensee shall maintain objectivity, integrity, and the highest standards in providing services to the client.

(3) A licensee shall:

(A) in addition to complying with any other applicable reporting requirements, promptly report to the department any suspected, alleged, or substantiated incidents of abuse, neglect, or exploitation committed by oneself or another licensee under this subchapter;

(B) unless otherwise prohibited by law, promptly report to the department violations of Texas Occupations Code, Chapter 504 (relating to Chemical Dependency Counselors), or rules adopted under the Act, including violations of this subchapter by oneself or another licensee;

(C) recognize the limitations of the licensee's ability and shall not offer services outside the licensee's scope of practice or licensure or use techniques that exceed the person's license authorization or professional competence. In the course of treating the substance abuse/dependence issues of a client, the licensee may independently address family issues, co-occurring mental health issues and physical and sexual abuse issues of a client if the counselor demonstrates:

*(i)* 45 hours of education in each area; and

*(ii)* 2,000 hours of clinically supervised post-licensure work experience by a qualified professional; and

(D) make every effort to prevent the practice of chemical dependency counseling by unqualified or unauthorized persons.

(4) A licensee shall not engage in the practice of chemical dependency counseling if impaired by, intoxicated by, or under the influence of chemicals, including alcohol.

(5) A licensee shall uphold the law and refrain from unprofessional and unethical conduct. In so doing, the licensee shall:

(A) comply with all applicable laws and regulations;

(B) not make any claim, directly or by implication, that the person possesses professional qualifications, licensure, or affiliations that the person does not possess;

(C) include, as applicable, their current credentials when signing all professional documents;

(D) not mislead or deceive the public or any person; and

(E) refrain from any act that might tend to discredit the license or profession.

(6) A licensee shall:

(A) report information fairly, professionally, and accurately to clients, other professionals, the department, and the general public;

(B) maintain complete, accurate, and appropriate documentation of services provided;

(C) not submit or cause or allow to be submitted to a client or third party payer a bill for services that were not provided or were improper, unreasonable, or medically or clinically unnecessary, with the exception of a missed appointment for which notice has been given that a charge will be assessed, and as permitted by law concerning third party billing; and

(D) provide responsible and objective training and supervision to interns and subordinates under the LCDC, CCS, or CTI's supervision. This includes properly documenting supervision and work experience and providing supervisory documentation needed for licensure.

(7) In any publication, a licensee shall give written credit to all persons or works that have contributed to or directly influenced the publication.

(8) Licensees shall respect a client's dignity, and shall not engage in, or permit their employees or supervisees to engage in, any action that may injure the welfare of any client or person to whom the licensee is providing services. The licensee shall:

(A) make every effort to provide access to treatment, including advising clients about resources and services, taking into account the financial constraints of the client;

(B) remain loyal and professionally responsible to the client at all times, disclose the counselor's ethical code of standards, and inform the client of the counselor's loyalties and responsibilities;

(C) not engage in any activity that could be considered a professional conflict, and shall immediately remove oneself from such a conflict if one occurs;

(D) terminate any professional relationship or counseling services that are not beneficial, or are in any way detrimental to the client;

(E) always act in the best interest of the client;

(F) not abuse, neglect, or exploit a client;

(G) not engage in a sexual, personal, or business relationship with a client or a member of the client's immediate family (including any client receiving services from the licensee's employer) for at least two years after the client's services end;

(H) not request a client to divulge confidential information that is not necessary and appropriate for the services being provided;

(I) not offer or provide chemical dependency counseling, supervision, or related services, nor meet with a client, in settings or locations which are inappropriate, harmful to the client or others, or which would tend to discredit the profession of chemical dependency counseling; and

(J) refrain from using any method or engaging in any conduct that could be considered coercive or degrading to the client or another, including, without limitation, threats, negative labeling, or attempts to provoke shame or humiliation.

(9) A licensee shall protect the privacy of all clients and shall not disclose confidential information without express written consent, except as permitted by law. The licensee shall remain knowledgeable of and obey all state and federal laws and regulations relating to confidentiality of chemical dependency treatment records, and shall:

(A) inform the client, and obtain the client's consent, before tape-recording the client or allowing another person to observe or monitor the client;

(B) ensure the security of client records;

(C) not discuss or divulge information obtained in clinical or consulting relationships except in appropriate settings and for professional purposes which clearly relate to the case, to the extent authorized by law;

(D) avoid invasion of the privacy of the client;

(E) provide the client his/her rights regarding confidentiality, in writing, as part of informing the client in any areas likely to affect the client's confidentiality; and

(F) ensure the data requested from other parties is limited to information that is necessary and appropriate to the services being provided and is accessible only to appropriate parties.

(10) A licensee shall inform the client about all relevant and important aspects of the professional relationship between the client and the licensee, and shall:

(A) in the case of clients who are not their own consenters, inform the client's parent(s) or legal guardian(s) of circumstances that might influence the professional relationship;

(B) not enter into a professional relationship with members of the counselor's family, close friends or associates, or others whose welfare might be jeopardized in any way by such relationship;

(C) not establish a personal relationship with any client (including any individual receiving services from the licensee's employer) for at least two years after the client's services end;

(D) neither engage in any type or form of romantic or sexual behavior with a client (including any individual receiving services from the licensee's employer) for at least two years after the client's services end nor accept as a client anyone with whom they have engaged in romantic or sexual behavior; and

(E) not exploit relationships with clients for personal gain.

(11) A licensee shall treat other professionals with respect, courtesy, and fairness, and shall:

(A) refrain from providing or offering professional services to a client who is receiving chemical dependency treatment and/or counseling services from another professional, except with the knowledge of the other professional and the consent of the client, until treatment and/or counseling services with the other professional ends;

(B) cooperate with the department, professional peer review groups or programs, and professional ethics committees or associations, and promptly supply all requested or relevant information, unless prohibited by law; and

(C) ensure that the person's actions in no way exploit relationships with supervisees, employees, students, research participants or volunteers.

(12) Prior to providing treatment and/or counseling or substance abuse services, a licensee shall inform the client of the licensee's fee schedule and establish financial arrangements with a client. The counselor shall not:

(A) charge exorbitant or unreasonable fees for any service;

(B) pay or receive any commission, consideration, or benefit of any kind related to the referral of a client for services;

(C) use the client relationship for the purpose of personal gain, or profit, except for the normal, usual charge for services provided; or

(D) accept a private professional fee or any gift or gratuity from a client if the client's services are paid for by another funding source, or if the client is receiving treatment from a facility where the licensee provides services (unless all parties agree to the arrangement in writing).

*§140.424. Complaint and Investigation Procedures.*

(a) The provisions of this section shall apply to complaints against a licensee under this subchapter, notwithstanding the provisions of §442.102 of this title (relating to Complaints and Investigations).

(b) A person wishing to report an alleged violation of the Act or this subchapter may file a complaint with the department. All complaints shall be in writing and under oath.

(c) Upon receipt of a complaint, the department will send an acknowledgment letter to the complainant, together with the department's policies and procedures pertaining to complaint investigation and resolution. The department may accept an anonymous complaint if there is sufficient information for the investigation.

(d) The department will document, evaluate, prioritize, and investigate complaints based on the seriousness of the alleged violation and the level of client or participant risk, and will make any report to another agency required by law.

(e) Prior to or during an investigation, the department will request a response from the licensee or person against whom a complaint has been filed, and provide the department's policies and procedures pertaining to complaint investigation and resolution. The licensee or person against whom an alleged violation has been filed shall respond within 15 working days of receipt of the department's request.

(f) Pursuant to a department investigation regarding an alleged violation of the Act or this subchapter, a licensee shall produce records, documents and other evidence related to the license, registration, or approval to the department, upon request, unless otherwise prohibited by law. A licensee shall not interfere with the department's access to clients, witnesses or other parties.

(g) If it is determined that the matters alleged in the complaint are non-jurisdictional, or if the matters alleged in the complaint would not constitute a violation of the Act or this subchapter, the department may close the complaint and give written notice of the closure to the person against whom the complaint was filed and the complainant.

(h) The department may refer complaints outside its jurisdiction, or also within the jurisdiction of another licensing program within the department or of another agency, to the appropriate program or agency for action, as permitted by law.

(i) The department, at least quarterly and until final disposition of the complaint, shall notify the person filing the complaint and each person against whom the complaint was made of the status of the complaint, unless the notice would jeopardize an undercover investigation.

*§140.425. Disciplinary Actions.*

(a) The provisions of this section shall apply to all types of licensees under this subchapter, notwithstanding the provisions of §442.103 of this title (relating to Procedure for Contested Cases for Counselor and Facility Licenses), and shall not limit the authority of the department to take any other action against a license, registration, or certification, or the holder of, or applicant for, a license, registration, or certification, under §140.430 of this title (relating to Criminal History Standards), or as otherwise authorized by applicable statute or rule.

(b) The department may take action as authorized under subsection (c) of this section if an applicant for, or holder of, a license, registration, or certification issued under this subchapter:

(1) violates or assists another to violate the Act or a rule under this subchapter;

(2) circumvents or attempts to circumvent the Act or a rule under this subchapter;

(3) directly or indirectly participates in a plan to evade the Act or a rule under this subchapter;

(4) has a license to practice chemical dependency counseling in another jurisdiction refused, suspended, or revoked for a reason that the department determines would constitute a violation of the Act or a rule under this subchapter;

(5) engages in false, misleading, or deceptive conduct as defined by Business and Commerce Code, §17.46;

(6) engages in conduct that discredits or tends to discredit the profession of chemical dependency counseling;

(7) directly or indirectly reveals a confidential communication made to the person by a client or recipient of services, except as required by law;

(8) refuses to perform an act or service the person is licensed to perform under this subchapter on the basis of the client's or recipient's age, sex, race, religion, national origin, color, or political affiliation; or

(9) commits an act for which liability exists under Civil Practice and Remedies Code, Chapter 81 (Relating to Sexual Exploitation By Mental Health Services Provider).

(c) Where grounds exist to take action against a person, against a license, certification, or registration issued under this subchapter, or against an applicant or holder of a license, certification, or registration issued under this subchapter, the department may:

(1) deny, refuse to issue, or refuse to renew a license, certification, or registration;

(2) revoke or suspend a license, certification, or registration;

(3) probate a suspension of a license, certification, or registration;

(4) impose an administrative penalty against a person who violates the Act or a rule under this subchapter; or

(5) issue a reprimand against the applicable license holder.

(d) The department will determine the length of the probation or suspension. If the department probates the suspension of a license, certification, or registration, the department may require the holder of the applicable license to:

(1) report regularly to the department on matters that are the basis of the probation;

(2) limit practice to the areas prescribed by the department; or

(3) complete additional educational requirements, as required by the department to address the areas of concern that are the basis of the probation.

(e) An individual whose license, registration, or certification is revoked under this subchapter is not eligible to apply for a license, registration, or certification under this subchapter for a minimum of two years after the date of revocation. The department may consider the findings that resulted in revocation and any other relevant facts in determining whether to deny the application under this section, or as otherwise permitted by law, if an otherwise complete and sufficient application for a license, registration, or certification is submitted after two years have elapsed since revocation.

(f) A voluntary surrender accepted by the department in response to a complaint under §140.428 of this title (relating to Voluntary Surrender of License, Certification, or Registration In Response to a Complaint) shall be deemed to be the result of a formal disciplinary action as provided for in that section.

(g) The department, upon determination that grounds may exist to take disciplinary action, shall issue a notice of violation notifying the respondent of the proposed action.

(1) The notice letter shall be sent via regular first-class and certified mail to the respondent's address of record.

(2) The notice shall specify:

(A) the statutes, rules, or orders allegedly violated;

(B) the factual basis of the alleged violations;

(C) the disciplinary action the department intends to take; and

(D) notice of an opportunity for a hearing to be held under the Administrative Procedure Act, Texas Government Code, Chapter 2001.

(3) If the department is proposing to assess an administrative penalty, the letter shall also inform the respondent of the amount of the proposed penalty and of the opportunity for a hearing on the occurrence of the violation, the amount of the penalty, or both.

(4) The letter shall also include the following notices:

(A) If the respondent does not request a hearing on or before the 20th day after notice is effective, the allegations will be deemed true and the department will issue a default final order implementing the proposed action.

(B) If the respondent requests a hearing but fails to appear at the scheduled hearing, the allegations will be deemed true and the State Office of Administrative Hearings will recommend a default proposal for decision to implement the proposed action.

(C) Notice is effective three days after the date of mailing.

(h) A respondent must submit a timely written request for a hearing to avoid having the allegations in the notice letter deemed true and a default order implementing the proposed action issued by the department. The request for hearing is timely if filed with the department or postmarked on or before the 20th day after the notice is effective. If the respondent fails to timely file a request for a hearing, the factual allegations of the notice letter may be deemed true and shall form the basis of a default final order by the department making findings of fact and conclusions of law consistent with the notice of violation, and implementing the proposed action.

(i) The department shall implement a final order to suspend a license issued under this subchapter for failure to pay child support as provided by the Texas Family Code, Chapter 232.

*§140.426. Administrative Penalties.*

(a) The provisions of this section shall apply to administrative penalties proposed or assessed against any person for violation of the Act or a rule under this subchapter, notwithstanding the provisions of §442.104 of this title (relating to Administrative Penalties for Licensed Facilities and Counselors and Offender Education Programs).

(b) The amount of an administrative penalty shall be based on the following criteria:

(1) the seriousness of the violation;

(2) the history of previous violations;

(3) the amount necessary to deter a future violation;

(4) efforts made to correct the violation; and

(5) any other matter that justice requires.

(c) The seriousness of a violation shall be categorized by one of the following severity levels:

(1) Level I--violations in which harm or other adverse impact to public health, safety, or welfare has actually occurred or is likely to occur and/or recur;

(2) Level II--violations that demonstrate a potential for harm or other adverse impact to public health, safety, or welfare; or

(3) Level III--violations that are not likely to substantially affect public health, safety, or welfare.

(d) The range of administrative penalties by severity levels is as follows for each violation:

(1) Level I--up to $1000 per day;

(2) Level II--up to $500 per day; or

(3) Level III--up to $100 per day.

(e) Subsequent violations of the same or similar nature in the same severity level for which an administrative penalty has previously been imposed may be categorized at the next higher severity level, based upon the repeated violation. Subsequent Level I violations of the same or similar nature for which an administrative penalty has previously been imposed at the Level I severity level may be assessed a

higher penalty within that severity level, up to $1,000 per day per violation, based upon the repeated violation.

*§140.427. Informal Disposition.*

(a) At any stage of a disciplinary case, informal disposition of a complaint or contested case involving an applicant or licensee may be made through an informal conference held to determine whether the matters in controversy can be resolved without further proceedings, including by agreed order.

(b) In any case where a notice of violation has been issued proposing disciplinary action against an applicant or licensee, that person will be given the opportunity to attend an informal conference to show compliance with the law, pursuant to Texas Government Code §2001.054 (relating to Licenses), prior to a requested hearing. If the applicant or licensee fails to appear at a scheduled informal conference, the department may deem that person to have waived the right to an informal conference and may proceed to hearing.

(c) An informal conference shall be voluntary for the applicant or licensee and shall not be a prerequisite to a formal hearing.

(d) The conference shall be informal and shall not follow the procedures established in this subchapter for contested cases and formal hearings.

(e) The department will establish the time, date and place of the informal conference, and provide written notice to the licensee or applicant. Written notice will be provided no less than 10 business days prior to the date of the informal conference at the last known address of the licensee or applicant.

(f) The applicant or licensee may be represented by legal counsel at the informal conference. The department's legal counsel and appropriate staff will be present at the conference.

(g) At the conclusion of the informal conference, the department may propose an informal disposition of the complaint or contested case. The proposal may include proposed entry of an agreed order imposing any disciplinary action authorized by the Act or this subchapter. The department may also conclude that the department lacks jurisdiction; that the matter should be referred for further investigation; that the complaint should be closed without action; or that the department will proceed to a contested case hearing on the proposed action, if one has been requested by the applicant or licensee, in accordance with §140.429 of this title (relating to Procedures for Contested Cases).

(h) The licensee or applicant may either accept or reject the department's proposal at the informal conference. If the recommendations are accepted, a proposed agreed order will be forwarded to the licensee or applicant, or that person's attorney. The order will include any agreed findings of fact and conclusions of law. If the licensee or applicant fails to return the signed order within 20 days of receipt of the proposed order, or within another time frame specified or agreed to by the department, the department's proposed order will be deemed withdrawn and the department may proceed to a contested case hearing on the action originally proposed, if the applicant or licensee has requested one, or otherwise proceed with appropriate action against the applicant or licensee. The licensee or applicant will be deemed to have received the proposed agreed order three days after mailing.

*§140.428. Voluntary Surrender of License, Certification, or Registration In Response to a Complaint.*

(a) When a licensee has offered the surrender of that person's license in response to a complaint, the department will consider whether to accept the surrender of the license. A licensee will be deemed to have offered the surrender of that person's license in response to a complaint when the surrender is offered after the licensee has received notice that a complaint has been received by the department. A licensee will be deemed to have received notice that a complaint has been received by the department three days after a letter notifying the licensee is mailed by the department.

(b) Surrender of a license without the department's acceptance thereof shall not deprive the department of jurisdiction under the Act, this subchapter, or other applicable law.

(c) When the department accepts the surrender of a license offered in response to a complaint, the license surrender is deemed to be the result of a formal disciplinary action and an order shall be prepared accepting the license surrender on that basis.

*§140.429. Procedures for Contested Cases.*

(a) The provisions of this section shall apply to licensees under this subchapter, notwithstanding the provisions of §442.103 of this title (relating to Procedure for Contested Cases for Counselor and Facility Licenses).

(b) Where the department has issued a notice of violation that has not been resolved by informal disposition and the respondent has timely requested a hearing, the department will proceed to a hearing under the APA, Texas Government Code, Chapter 2001; SOAH Rules of Procedure, 1 Texas Administrative Code, Chapter 155; and formal hearing procedures set forth at §§1.21, 1.23, 1.25, and 1.27 of this title.

(c) The department will provide written notice of the hearing to the respondent by first class mail and certified mail, return receipt requested, at respondent's last known address as reflected in the department's address of record for the respondent. A Notice of Hearing that complies with the requirements of Texas Government Code, §2001.051 and §2001.052 (relating to Opportunity for Hearing and Participation; Notice of Hearing and Contents of Notice), and 1 Texas Administrative Code §155.27 (relating to Notice of Hearing), will be provided at least ten days before the date of the hearing. Respondent's receipt of the Notice of Hearing at least ten days before the date of the hearing will be presumed if the department mailed the Notice of Hearing at least ten days before the date of the hearing, and allowed an additional three days for mailing.

(d) If the respondent fails to appear at a scheduled SOAH hearing after being given proper notice of the hearing at respondent's last known address as reflected in the department's address of record for the respondent, the department may move for dismissal of the case from the SOAH docket, without prejudice, to allow for informal disposition of the case by default order, as provided for in §1.25 of this title (relating to Default). Based upon the respondent's failure to appear after proper notice of the hearing, the factual allegations of the notice letter may be deemed true and shall form the basis of a final default order by the department making findings of fact and conclusions of law consistent with the notice of violation, and implementing the proposed action.

(e) If a respondent makes a written request to the department for a transcript of a SOAH proceeding, the department will assess the cost of the transcript to that respondent. If there were multiple respondents to the proceeding, the department will assess the cost proportionally among those respondents requesting a transcript. Where a respondent appeals a final department decision in a contested case, the respondent shall pay the cost of preparation of the original or a certified copy of the record that is required to be sent to the reviewing court, and such charge may be assessed against respondent by the court in accordance with the Texas Rules of Civil Procedure as a court cost.

*§140.430. Criminal History Standards.*

(a) The department reviews the criminal history of each applicant for initial licensure, certification, and registration. Reviews are also conducted when the department receives information that a licensee has been charged, indicted, placed on deferred adjudication,

community supervision, or probation, or convicted of an offense described in subsection (d) of this section.

(b) An applicant shall disclose and provide complete information about all misdemeanor and felony charges, indictments, deferred adjudications, episodes of community supervision or probation, and convictions. Failure to make full and accurate disclosure may be grounds for application denial or disciplinary action, including revocation, against the applicant for, or holder of, a license, registration, or certification.

(c) The department obtains criminal history information from the Texas Department of Public Safety, including information from the Federal Bureau of Investigations (FBI).

(d) For purposes of this section, the department has identified the following offenses as offenses directly related to the duties and responsibilities of the licenses, certifications, and registrations issued under this subchapter, and has categorized them according to the seriousness of the offense. The provisions of this section shall not limit the authority of the department to take any other action against a license, registration, or certification, or the holder of, or applicant for, a license, registration, or certification, as otherwise authorized by applicable statute or rule.

(1) Category X includes:

(A) capital offenses;

(B) sexual offenses involving a child victim;

(C) felony sexual offenses involving an adult victim who is a client (one or more counts);

(D) multiple counts of felony sexual offenses involving any adult victim; and

(E) homicide 1st degree.

(2) Category I includes:

(A) kidnapping;

(B) arson;

(C) homicide lesser degrees;

(D) felony sexual offenses involving an adult victim who is not a client (single count); and

(E) attempting to commit crimes in Category I or X.

(3) Category II includes felony offenses that are not listed separately in this section and that result in actual or potential physical harm to others and/or animals.

(4) Category III includes:

(A) class A misdemeanor alcohol and drug offenses;

(B) class A misdemeanor offenses resulting in actual or potential physical harm to others or animals;

(C) felony alcohol and drug offenses; and

(D) all other felony offenses not listed separately in this section.

(5) Category IV includes:

(A) class B misdemeanor alcohol and drug offenses; and

(B) class B misdemeanor offenses resulting in actual or potential physical harm to others or animals.

(e) Except as provided in subsection (j) of this section, the department shall deny the initial or renewal licensure, certification, or registration application of a person who has been convicted or placed on community supervision in any jurisdiction for a:

(1) category X offense during the person's lifetime;

(2) category I offense during the 15 years preceding the date of application;

(3) category II offense during the ten years preceding the date of application;

(4) category III offense during the seven years preceding the date of application; or

(5) category IV offense during the five years preceding the date of application.

(f) The department shall deny the initial or renewal license, certification, or registration application of a person who has been found to be incapacitated by a court on the basis of a mental defect or disease.

(g) When a person's application is denied under subsection (e) or (f) of this section, the person may reapply when:

(1) the person receives a full pardon based on the person's wrongful conviction;

(2) the timeframes established in subsection (e) of this section have been met; or

(3) the person who had been found to be incapacitated is found to be no longer incapacitated, in which case the provisions of this section applicable to the status of the charge and prosecution at that time will apply.

(h) The department shall suspend a license, certification, or registration if the department receives written notice from the Texas Department of Public Safety or another law enforcement agency that the individual has been charged, indicted, placed on deferred adjudication, community supervision, or probation, or convicted of an offense described in subsection (d) of this section. The licensee will remain subject to applicable renewal requirements during the period of suspension. Any license renewed during that period will remain suspended upon renewal and until the time frames set forth in subsection (e) of this section have been met.

(1) The department shall send notice stating the grounds for summary suspension by certified mail to the license, certification, or registration holder at the address listed in the department's records. The suspension is effective three days after the date of mailing.

(2) If no other bar to licensure, certification, or registration exists at the time, the department will restore the person's license, certification, or registration upon receipt of official documentation that the charges have been dismissed or the person has been acquitted, except that, where the dismissal follows a deferred adjudication, the time frames set forth in subsection (e) of this section will apply.

(i) The department will defer action on the application of a person who has been charged or indicted for an offense described in subsection (d) of this section. If the person is convicted or placed on community supervision for the offense, subsection (e) of this section will apply. If the charges are dismissed or the person is acquitted, the application will be processed without adverse action under this section on the basis of those charges. However, the department may consider the facts and evidence underlying the charge in determining whether adverse action against the applicant might be warranted under §140.425 of this title (relating to Disciplinary Actions).

(j) Notwithstanding subsection (e) of this section, if no other bar to LCDC initial licensure or renewal exists at the time, the department may issue or renew an LCDC license to a person convicted or placed on community supervision in any jurisdiction, within the timeframes set forth in subsection (e) of this section, for a drug or alcohol offense described in subsection (d) of this section, if the department determines that the individual has successfully completed participation in a peer assistance program approved by the department. When an LCDC licensure or renewal applicant successfully reaches the re-entry phase of a peer assistance program, the department may grant a temporary "re-entry approval," with a limited term and any appropriate conditions, set in conjunction with the peer assistance program, based upon the applicant's needs and the anticipated length of the re-entry phase of the peer assistance program for the applicant. At the end of the term of the re-entry approval, the department may extend the term if the applicant is still successfully participating in the re-entry phase of the peer assistance program, may grant an LCDC license or renewal license if the department determines that the LCDC has successfully completed the peer assistance program, or shall deny the license under subsection (e) of this section, if the LCDC has failed to successfully complete the peer assistance program.

(k) A person whose license, certification, or registration has been denied or suspended under this section may only appeal the action if:

(1) the person was convicted or placed on community supervision; and

(2) the appeal is based on the grounds that the timeframes defined in subsection (e) of this section have been met.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801120
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 458-7111 x6972

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# CHAPTER 169. ZOONOSIS CONTROL
# SUBCHAPTER B. CARE OF ANIMALS BY CIRCUSES, CARNIVALS, AND ZOOS

**25 TAC §§169.41 - 169.48**

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§169.41 - 169.48, concerning the care of animals by circuses, carnivals, and zoos.

BACKGROUND AND PURPOSE

These proposed rules are necessary to comply with Occupations Code, Chapter 2152, (formerly Health and Safety Code, Chapter 824), "Regulation of Circuses, Carnivals, and Zoos," §2152.051.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 169.41 - 169.48 have been reviewed, and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are mandated.

Specifically, the sections cover purpose, definitions, facilities for housing the animals, transportation of animals, food and water requirements, care in transit, licenses, and state inspection agents.

After carefully considering the alternatives, the department believes the proposed rules as amended are the best method of implementing the statute to protect the public health with rules for the care of animals by circuses, carnivals, and zoos in the State of Texas.

SECTION-BY-SECTION SUMMARY

The proposed amendments to §169.41 - 169.48 modify the language to make it more concise, update the definitions, add a statutory citation, revise the legacy agency names and department areas, and replace "director" with "manager" for the Zoonosis Control Branch.

The proposed revisions to the sections update and clarify language to enable those subject to the sections to more readily comply. The amendments promote humane conditions for these animals and promote public health and safety.

FISCAL NOTE

Martha McGlothlin, Section Director, Community Preparedness Section, has determined that, for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. McGlothlin has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the amendments to these sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. McGlothlin has also determined that, for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of clarifying language in the sections will be to promote humane conditions for animals and public health and safety.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to

protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendments do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Tom Sidwa, DVM, Department of State Health Services, Community Preparedness Section, Zoonosis Control Branch, MC 1956, P.O. Box 149347, Austin, Texas 78714-9347, or by e-mail to Tom.Sidwa@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed amendments are authorized by Occupations Code, Chapter 2152, "Regulation of Circuses, Carnivals, and Zoos," §2152.051, which requires the adoption of rules to administer the chapter, and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department. Review of the rules implements Government Code, §2001.039.

The proposed amendments affect Occupations Code, Chapter 2152; Government Code, Chapters 531 and 2001; and Health and Safety Code, Chapter 1001.

*§169.41. Purpose.*

The purpose of these rules is to establish standards regarding the care of animals in circuses, carnivals, and zoos that [~~which~~] will promote humane conditions for these animals and public health and safety.

*§169.42. Definitions.*

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

[~~(2) Board--Texas Board of Health.~~]

[~~(3) Commissioner--Commissioner of the Texas Department of Health.~~]

(2) [~~(4)~~] Department--Department of State Health Services [~~Texas Department of Health (TDH)~~].

(3) [~~(5)~~] Housing facility--Any room, building, or area used to contain a primary enclosure or enclosures.

(4) [~~(6)~~] Primary enclosure--Any structure used to immediately restrict an animal or animals to a limited amount of space, such as a room, pen, run, cage, compartment, or hutch.

(5) [~~(7)~~] Sanitize--To make physically clean and to destroy disease-producing organisms.

(6) [~~(8)~~] Zoonosis Control Branch (ZCB) [~~Zoonosis Control Division (ZCD)~~]--Branch [~~Division~~] of the Department of State Health Services [~~Texas Department of Health~~] to which the responsibility for administering [~~implementing~~] these rules is assigned.

*§169.43. Facilities for Housing the Animals.*

(a) Housing facilities shall:

(1) (No change.)

(2) have reliable and adequate electric power, if required to comply with other provisions of this subsection, and have adequate potable water [~~shall be~~] available;

(3) - (5) (No change.)

(b) Indoor facilities shall:

(1) (No change.)

(2) be adequately ventilated to provide for the health and comfort of the animals at all times by providing fresh air either by means of windows, doors, vents, or air conditioning[~~;~~] and be ventilated so as to minimize drafts, odors, and moisture condensation;

(3) - (5) (No change.)

(c) Outdoor holding facilities shall:

(1) - (2) (No change.)

(3) be constructed in such a manner that they will protect the animals [~~animal~~];

(4) - (5) (No change.)

(d) Primary enclosures shall:

(1) - (2) (No change.)

(3) enable each [~~the~~] animal to remain dry and clean;

(4) be constructed so as to protect the [~~animal's~~] body and extremities of every animal from injury; and

(5) (No change.)

(e) Feeding shall:

(1) be at least once a day except as otherwise directed by a licensed veterinarian, as defined in the Texas Health and Safety Code, §826.002, and with food free from contamination, wholesome, palatable, and of sufficient quality and nutritive value to meet the normal daily requirements for the condition and size of the animal(s); and

(2) be in food receptacles accessible to each animal and located so as to minimize contamination by excreta.

(A) - (B) (No change.)

(C) Self feeders may be used for feeding dry foods to animals acclimated to their use, but they must be kept clean and sanitary to prevent molding, deterioration, or caking of feed.

(f) - (i) (No change.)

*§169.44. Transportation of Animals.*

(a) Primary enclosure construction. All compartments, transport cages, cartons, or crates shall be constructed such that:

(1) structural strength and size are sufficient to contain the live animal(s) [~~animals~~] and to withstand the normal rigors of transportation.

(2) - (6) (No change.)

(7) the size is adequate to allow each [~~the~~] animal to turn about freely and to make normal postural adjustments, except when

restriction of movement is essential to prevent danger to any [~~the~~] animals, handlers, or other persons; and

(8) (No change.)

(b) Transportation in primary enclosures. Primary enclosures used to transport live animal(s) [~~animals~~] shall:

(1) - (3) (No change.)

(c) Primary conveyances. The animal cargo space of primary conveyances transporting live animals shall:

(1) be designed and constructed to protect the health[~~,~~] and ensure the safety and comfort of the live animals contained therein at all times;

(2) - (6) (No change.)

*§169.45. Food and Water Requirements in Transit.*

(a) Each live animal shall be fed a sufficient quantity of food at least once in each 24-hour period unless there are special instructions given by a licensed veterinarian. The food shall be free from contamination, wholesome, palatable, and of sufficient quality and nutritive value to meet the normal requirements for the condition and size of the animal [~~animal(s)~~].

(b) Potable water shall be provided to each animal at all times or at least twice daily for periods of not less than one hour, except as directed by a licensed veterinarian.

*§169.46. Care in Transit.*

The carrier, driver, or other employee shall be responsible to:

(1) - (4) (No change.)

(5) provide protection to live animals, allowing them to remain dry during any form of precipitation [~~rain or snow~~].

*§169.47. Licenses.*

(a) Types.

(1) A regular operating license is issued for a period of two years from date of issue or such lesser period as the Executive Commissioner of the Health and Human Services Commission [~~board~~] shall deem appropriate for circuses or animal variety shows which are not resident in Texas and which are not exempt by law.

(2) A temporary operating license may be [~~is~~] issued and is valid until a regular license is issued or unless the temporary license is revoked for cause and is valid for two years from the date of application or until approval or denial of a regular operating license.

(b) - (c) (No change.)

(d) Information. Application, renewal forms, and/or information may be obtained by contacting Texas Department of State Health Services, Zoonosis Control Branch [~~Texas Department of Health, Zoonosis Control Division~~], 1100 West 49th Street, Austin, Texas 78756.

(e) Fees. The following fees shall accompany each application for an operating license and/or renewal of a license:

(1) 1 animal to 25 animals--$400;

(2) - (4) (No change.)

(f) (No change.)

(g) Any facility that does not meet required standards will not be licensed by the department [~~TDH~~].

*§169.48. State Inspection Agents.*

Each agent inspecting circuses, carnivals, or zoos under Occupations Code, Chapter 2152, will be approved by the manager, Zoonosis Control Branch [~~director, Zoonosis Control Division~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 22, 2008.

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Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 458-7111 x6972



# CHAPTER 450. COUNSELOR LICENSURE

**25 TAC §§450.100 - 450.126**

*(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)*

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§450.100 - 450.126, concerning the licensing and regulation of chemical dependency counselors.

BACKGROUND AND PURPOSE

The repeals are necessary to implement amendments to Texas Occupations Code, Chapter 504, made by Senate Bill (SB) 155, which was adopted by the 80th Legislature, Regular Session, 2007. New and amended rule provisions implementing SB 155 include provisions relating to the approval of peer assistance programs, the certification of clinical supervisors, modifications to the continuing education requirement for renewal of the licensed chemical dependency counselor (LCDC) license, the recognition of other certifications on the LCDC license, and making all persons now licensed, registered, or certified under Texas Occupations Code, Chapter 504, subject to the same extent to disciplinary action and to the criminal history standards developed under that chapter. The repeal and new rules also consolidate existing Professional Licensing and Certification Unit program rules into 25 Texas Administrative Code (TAC) Chapter 140, Health Professions Regulation.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001, (Administrative Procedure Act). Sections 450.100 - 450.126 have been reviewed and the department has determined that, except as amended under the proposed new rules, the reasons for adopting the sections continue to exist because rules on this subject are needed. However, the department is proposing to repeal the existing sections and adopt the rules in 25 TAC Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

The repeal of §§450.100 - 450.126 is necessary in order to combine the Professional Licensing and Certification Unit rules in one chapter, 25 TAC Chapter 140, Health Professions Regulation.

FISCAL NOTE

Cindy Bourland, Manager, Professional Licensing and Certification Unit, has determined that for each year of the first five-year period that the repeals are in effect, there will be no fiscal implications to state or local governments as a result of repealing the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Bourland has also determined that there will be no adverse economic impact on small businesses or micro-businesses as a result of the repeals as proposed. This determination was made because the repeals do not impose any new requirements that impose a cost on small businesses, as defined by Government Code, §2006.001. Small businesses and micro-businesses will not be required to alter their business practices based upon the repeals. There is no anticipated economic cost to individuals as a result of the repeals as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Bourland has also determined that for each year of the first five years the sections are in effect, the public will benefit from the adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to protect and promote public health, safety, and welfare, by regulating licensed chemical dependency counselors, certified clinical supervisors, clinical training institutions, and counselor interns. In addition, approved peer assistance programs provided for by the rules will encourage impaired counselors to obtain assistance for their impairment, and the availability of certified clinical supervisors will increase the training and supervision options for counselor interns and thereby facilitate the licensure of additional licensed chemical dependency counselors.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the pubic health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Stewart Myrick, Program Director, Licensed Chemical Dependency Counselor Program, Professional Licensing and Certification Unit, MC 1982, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, P.O. Box 149347, Austin, Texas 78756, (512) 834-4565, or by e-mail to lcdc@dshs.state.tx.us. When submitting comments by e-mail, please indicate "Comments on Proposed Rules" in the subject line. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed repeals have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed repeals are authorized by Texas Occupations Code, §504.051, which authorizes rulemaking necessary to carry out the duties established under Texas Occupations Code, Chapter 504, the establishment of standards of conduct and ethics for Chapter 504 licensees, and the establishment of additional criteria for peer assistance programs for chemical dependency counselors; Texas Occupations Code, §504.053, which authorizes the Executive Commissioner of the Health and Human Services Commission to set application, examination, license renewal, and other fees in amounts sufficient to cover the costs of administering Chapter 504; and by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed repeals affect the Texas Occupations Code, Chapter 504; Health and Safety Code, Chapter 1001; and Government Code, Chapter 531. Review of the rules implements Government Code, §2001.039.

*§450.100. Definitions.*

*§450.101. License Required.*

*§450.102. Scope of Practice.*

*§450.103. Department Review.*

*§450.104. Fees.*

*§450.105. Licensure Application Standards and Registration.*

*§450.106. Requirements for Counselor Intern Registration.*

*§450.107. Standards for 270 Educational Hours.*

*§450.108. Practicum Standards.*

*§450.109. Education and Experience Exemptions/Waivers.*

*§450.110. Requirements for Licensure.*

*§450.111. Standards for Supervised Work Experience.*

*§450.112. Examination.*

*§450.113. Issuing Licenses.*

*§450.114. Licensure through Reciprocity.*

*§450.115. Criminal History Standards.*

*§450.116. License Expiration and Renewal/Active Military Duty.*

*§450.117. Continuing Education Standards.*

*§450.118. Inactive Status.*

*§450.119. Documentation.*

*§450.120. Counseling Through Electronic Means.*

*§450.121. Ethical Standards.*

*§450.122. Actions Against a License.*

*§450.123. Clinical Training Institution (CTI) Registration.*

*§450.124. Clinical Training Institution (CTI) Standards.*

*§450.125. Direct Supervision of Interns.*

*§450.126. Intern Violations.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801121
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 458-7111 x6972

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# TITLE 28. INSURANCE

## PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

### CHAPTER 133. GENERAL MEDICAL PROVISIONS

### SUBCHAPTER A. GENERAL RULES FOR MEDICAL BILLING AND PROCESSING

**28 TAC §§133.2, 133.4, 133.5**

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes amendments to §133.2 concerning definitions. The Division further proposes new §133.4 concerning notification to healthcare providers of contractual agreements with informal networks and voluntary networks and new §133.5, concerning informal network and voluntary network reporting requirements to the Division.

The proposed amendments to §133.2 are necessary to update existing rule definitions, citations, and to add definitions recently enacted by Labor Code §413.0115. Proposed new §133.4 is necessary to comply with Labor Code §413.011(d-2) which was enacted by House Bill (HB) 473, 80th Legislature Regular Session. Pursuant to Labor Code §413.011(d-1), an insurance carrier or the insurance carrier's authorized agent may use an informal or voluntary network, as those terms are defined by Labor Code §413.0115, to obtain a contractual agreement that provides for fees different from the fees authorized under the Division's fee guidelines. In order to provide increased transparency of insurance carrier access to health care provider contractual fee arrangements with informal and voluntary networks, Labor Code §413.011(d-2) requires the Commissioner by rule to establish the time and manner by which an informal or voluntary network, or the insurance carrier or the insurance carrier's authorized agent, must provide notice. The notice must inform the health care provider of any person that is given access to the health care provider's contract with the informal or voluntary network. Proposed new §133.5 is necessary to specify additional informal network and voluntary network reporting requirements to the Division as well as the requirements imposed by Labor Code §413.0115.

The proposed amendment to §133.2(1) makes a change to the definition of "bill review" by deleting the reference to "Division". This change is needed as Labor Code §413.011(d-1) allows an insurance carrier to pay fees to a health care provider that are inconsistent with Division fee guidelines if the insurance carrier, or a network under Insurance Code Chapter 1305, arranging out-of-network services under Insurance Code §1305.006, has a contract with the health care provider that includes a specific fee schedule. In addition, pursuant to certain statutory requirements, Labor Code §413.011(d-1) provides that an insurance carrier or the carrier's authorized agent, may use an informal or voluntary network, as those terms are defined by Labor Code §413.0115, to obtain a contractual agreement that provides for fees different from the fees authorized under the Division's fee guidelines. As such, when conducting a bill review, it may become necessary to review a fee guideline other than the fee guideline adopted by the Division.

The proposed amendment to §133.2(2) adds the symbol/and the term "Formats" after the term "Forms" to reflect the correct subsection title of §133.10 which is entitled "Required Billing Forms/Formats". In addition, §133.2(2) makes a change to the definition of "complete medical bill" by deleting the citation to "Chapter 135 of this title (relating to Electronic Medical Billing, Reimbursement, and Documentation)" and substituting the correct citation reference to "§133.500 (relating to Electronic Formats for Electronic Medical Billing Processing)." The proposed amendment to §133.2(6) revises the definition of "insurance carrier agent" to delete the term "or" and substitute it with the term "including". This revision makes clear that an insurance carrier agent is a person or entity that the insurance carrier contracts with or utilizes for the purpose of providing claims services and would include fulfilling the insurance carrier's obligations for medical bill processing. The proposed amendment to §133.2(9) adds the statutory definitions for "voluntary networks" and "informal networks" by stating such terms will have the meanings assigned by Labor Code §413.0115.

Proposed new §133.4(a) defines the term "person" used in the section to mean "an individual, partnership, corporation, hospital district, organization, business trust, estate trust, association, limited liability company, limited liability partnership, or other entity to whom an informal network or voluntary network's fee arrangement with a health care provider is sold, leased, transferred, or conveyed on behalf of an insurance carrier." Proposed new §133.4(a) specifies that the term "person" does not include an injured employee. Since the Division is at an early phase of determining the number of informal network and voluntary networks operating in Texas due to Labor Code §413.0115 reporting requirements, it is necessary to define "person" as any entity that is given access to the informal or voluntary network's fee arrangement with a health provider on behalf of an insurance

carrier by way of selling, leasing, transferring, or conveying such fee arrangement.

Proposed new §133.4(b) is necessary to implement and specify the required health care provider notification. Proposed new §133.4(b) states that each informal network or voluntary network, or the insurance carrier, or the insurance carrier's authorized agent, as appropriate, shall notify each "affected health care provider of any person that is given access to the informal or voluntary network's fee arrangement with that health care provider, including, but not limited to, any person to whom the informal or voluntary network's fee arrangement with that health care provider is sold, leased, transferred, or conveyed, within the time and manner provided by this section." Section 133.4(b) is also necessary to implement the notification requirements of Labor Code §413.011(d-2). In addition, legislative analysis supports the necessity of giving notice to contracting health care providers. On April 3, 2007, the House Research Organization analyzed an earlier version of HB 473 and found that "[f]requently, providers do not know if they are in a voluntary or certified network because carriers can lease networks to other companies without informing the providers." In addition, proposed §133.4(b) allows for the flexibility to determine which entity will provide the notice to the affected health care provider.

Proposed new §133.4(c) establishes the content of the notification. Section 133.4(c)(1) states that notification to each contracted health care provider shall include contact information for the informal or voluntary network, including a toll-free telephone number accessible to all contracted health care providers. Proposed new §133.4(c)(2) further requires the following information in the body of the notice: "(A) contact information and identification of any insurance carrier, or other person that is given access to the informal or voluntary network's fee arrangement with a health care provider, including, but not limited to, any person to whom the informal network or voluntary network's fee arrangement with the health care provider is sold, leased transferred, or conveyed; and (B) the start date and any end date during which any person has been given access to the health care provider's fee arrangement." Pursuant to Labor Code §413.011, health care providers that enter into a contractual fee arrangement with an informal network or voluntary network need to receive notice when access to such contractual fee arrangement is allowed. Should providers have questions concerning the access allowed to their contractual fee arrangement, billing questions, duration of access allowed, or any other inquiries, it is necessary that the notice include the information specified in proposed new §133.4(c).

Proposed new §133.4(d) provides for the method of notification. Proposed new §133.4(d) provides that the information listed in §133.4(c) may be provided in an electronic format provided a paper version is available upon request by the Division. In addition, a link to a website may be provided only if the website (1) contains the information stated in §133.4(c)(2)(A) and §133.4(c)(2)(B); (2) is updated at least monthly; and (3) contains current and correct information. Therefore, §133.4(d) allows the notifying party to select a method of notification most appropriate for that entity's business needs as long as the notice contains the requisite information required by new proposed §133.4(c). For purposes of medical dispute resolution and Division enforcement matters, it is necessary that an entity that uses electronic means to notify the health care provider make available a paper version of such notification upon the request of the Division.

Proposed new §133.4(e) provides that the informal or voluntary network, insurance carrier or the insurance carrier's authorized agent, as appropriate, shall document the content of the notice, the delivery of the notice, to whom the notice was delivered, and the date of the delivery. Proposed new §133.4(e) further provides that failure to provide documentation upon the request of the Division or failure to provide notice that complies with the requirements of Labor Code §413.011 and this section creates a rebuttable presumption in a Division enforcement action or in a medical fee dispute that the health care provider has not received the notification. To assist in deciding medical fee disputes and enforcement matters, it is necessary that the notifying party document notification to the health care provider within the time and manner specified by this rule.

Proposed new §133.4(f) provides for the time of notification. Section 133.4(f)(1) states that for contracts with health care providers in effect on June 1, 2008, initial notification must be made no later than September 1, 2008, and subsequent notices to health care providers in accordance with this section shall occur thereafter on a quarterly basis. A period of ninety (90) days should provide the informal or voluntary network, insurance carrier, or the insurance carrier's authorized agent sufficient time to determine which entity will provide the initial notification. This ninety (90) day timeframe should provide the notifying entity sufficient time to provide such notification for all existing contracts in effect on June 1, 2008. The subsequent quarterly notices are to be sent to the health care providers after the entity providing notice (e.g., the insurance carrier, the insurance carrier's authorized agent, the informal network, or the voluntary network), sends the initial notice to affected health care providers. The subsequent quarterly notice to health care providers with contracts in effect on June 1, 2008, should provide adequate notice to health care providers of any person that is allowed access to their contractual fee arrangements while allowing these notices to be provided in a cost-effective manner for the notifying entity.

Proposed new §133.4(f)(2) provides that for contracts with health care providers entered into after June 1, 2008, initial notification must be made no later than the 30th day after the effective date of the contract and subsequent notices provided to health care providers in accordance with this section thereafter on a quarterly basis. A period of thirty (30) days should provide the informal or voluntary network, insurance carrier, or the insurance carrier's authorized agent with sufficient time to initially notify the contracting health care provider of access allowed to the fee arrangement and to determine which entity will provide the initial notification. The subsequent quarterly notices are to be sent to the health care providers after the notifying entity (i.e., the insurance carrier, the insurance carrier's authorized agent, the informal network, or the voluntary network) sends the initial notice to the health care providers. In addition, the subsequent quarterly notice to health care providers with contracts in effect after June 1, 2008, should provide adequate notice to health care providers of any person that is allowed access to their contractual fee arrangements while allowing these notices to be provided in a cost-effective manner for the notifying entity.

Proposed new §133.4(g) provides that the insurance carrier is not entitled to pay a health care provider at a contracted fee if (1) the notice to the health care provider does not meet the criteria outlined in subsections (c)(2)(A) and (c)(2)(B) of this section; or (2) the notice to the health care provider does not meet the requirements of Labor Code §413.011 and §133.4(b) - (f); or (3) there are no required contracts in accordance with Labor Code

§413.011(d-1) and §413.0115. It is necessary that the notice contain the start date and any end date during which any person has been given access to the health care provider's contracted fee arrangement. If this information is not included in the notice, the health care provider has no means of determining whether the payment for a date of service falls within the dates during which the person had access to the health care provider's fee arrangement. In addition, Labor Code §413.011(d-2) provides that the time and manner of notification to the affected health care provider shall occur as provided by Commissioner rule. As such, if notification to the affected health care provider does not comply with proposed subsections (b) - (f) of this section, the insurance carrier is not entitled to pay at the contracted fee rate. There are specific contractual arrangements that are necessary before an insurance carrier, or the insurance carrier's authorized agent, may use an informal or voluntary network to obtain a contractual fee arrangement. If the requisite contracts do not exist, then the insurance carrier may not pay a health care provider at a contracted fee rate. Labor Code §413.011(d-1) requires a contractual arrangement between (1) the insurance carrier or the insurance carrier's authorized agent and the informal or voluntary network that authorizes the informal or voluntary network to contract with health care providers on the insurance carrier's behalf; and (2) the informal or voluntary network and the health care provider that includes a specific fee schedule and complies with the notice requirements established under subsection (d-2) of the Labor Code. In addition, Labor Code §413.0115(a)(1)(A) and (B) provide that an "informal network" means "a health care provider network described by §413.011(d-1) that is established under a contract between an insurance carrier and health care providers; and includes a specific fee schedule". Labor Code §413.0115(a)(2) further provides that a voluntary network means "a voluntary workers" compensation health care delivery network established by an insurance carrier under former Labor Code §408.0223, as that section existed before repeal by Chapter 265, Acts of the 79th Legislature, Regular Session, 2005.

Proposed new §133.4(h) provides that if the insurance carrier is not entitled to pay a health care provider at a contracted rate as outlined in subsection (g) of this section and as provided in Labor Code §413.011(d-1), the Division fee guidelines will apply.

Proposed new §133.4(i) provides that if notification to the healthcare provider does not meet the requirements of proposed new subsections (b) - (f) of this section, the insurance carrier may be held liable for any administrative violations. Labor Code §413.011(d-1) establishes that an insurance carrier may not reimburse a health care provider at a contracted fee rate if there is non-compliance with notification to the health care provider under this new proposed section. In addition, since under Labor Code §413.011(d-1) the insurance carrier, or an agent acting on behalf of the insurance carrier, makes the business decision to initiate a contractual fee arrangement with an informal or voluntary network, it necessarily follows that the insurance carrier may be held liable for any administrative violation if there is non-compliance with the Labor Code or this proposed new section for notification to the affected health care provider. In addition, Labor Code §413.011(d-1) provides the compliance requirements by stating that "[a]n insurance carrier or the carrier's authorized agent may use an informal network or voluntary network, as those term are defined by Labor Code §413.0115, to obtain a contractual agreement that provides for fees different from the fees authorized under the Division's fee guidelines. If a carrier, or the carrier's authorized agent, chooses to use an informal or voluntary network to obtain a contractual fee arrangement, there must be a contractual arrangement between: (1) the carrier or authorized agent and the informal or voluntary network that authorizes the network to contract with health care providers; and (2) the informal network or voluntary network and the health care provider that includes a specific fee schedule and complies with the notice requirements established under subsection (d-2)".

Proposed new §133.4(j) contains a severability clause and states that if a court of competent jurisdiction holds that any provision of this section is inconsistent with any statutes of this state, are unconstitutional, or are invalid for any reason, the remaining provisions of this section shall remain in effect. Proposed new §133.4(k) provides that in accordance with Labor Code §413.011(d-6), the provisions of this rule shall expire on June 1, 2011.

Proposed new §133.5(a) provides that each informal network and voluntary network must provide the following information to the Division: (1) the informal network or voluntary network's name and federal employer identification number (FEIN); (2) an executive contact for official correspondence for the informal or voluntary network; (3) a toll-free telephone number by which a health care provider may contact the informal network or voluntary network; (4) a list of each insurance carrier with whom the informal network or voluntary network contracts, including the insurance carrier's FEIN; and, (5) a list of each entity or insurance carrier agent associated with the informal or voluntary network working on behalf of the insurance carrier, including contact information for each entity. Proposed new §133.5(a) includes the Labor Code §413.0115 requirements imposed on an informal network and voluntary network for reporting information to the Division. As a means of ensuring that the Division appropriately identifies the reporting voluntary network or informal network, proposed new §133.5(a)(1) further requires the informal network or voluntary network to report its FEIN to the Division. Likewise, proposed new §133.5(a)(4) requires the informal or voluntary network to report each insurance carrier's FEIN with which the informal or voluntary network contracts to the Division for identification of the insurance carrier.

Proposed new §133.5(b) provides that the reports, including changes, must be submitted through the Division's on-line reporting system accessible through the Division's website at *www.tdi.state.tx.us*. This method of reporting will provide a consistent and direct method of reporting to the Division. Proposed new §133.5(c) provides that each informal network and voluntary network that has a contract with an insurance carrier or an insurance carrier's authorized agent in effect on September 1, 2007, must report to the Division in accordance with this section no later than June 1, 2008. Effective September 1, 2007, informal networks and voluntary networks were required to report information to the Division pursuant to Labor Code §413.0115. However, for the additional requirements under proposed new §133.5, the Division will allow additional time for the informal networks or voluntary networks to report in accordance with this proposed new section. Proposed new §133.5(c) further provides that except as provided in this subsection, informal and voluntary networks must report to the Division in accordance with this new proposed section no later than the 30th day after the effective date of the contract signed with an insurance carrier or an insurance carrier's authorized agent. In order for the Division to know the number of voluntary networks and informal networks that are operating in the workers' compensation system, it is necessary to require a deadline by which the newly contracted informal or voluntary

network must satisfy the reporting requirements under Labor Code §413.0115 and this newly proposed section.

Proposed new §133.5(d) provides that each informal network and voluntary network shall report any changes to the information provided under subsection (a) to the Division not later than the 30th day after the effective date of the change in accordance with Labor Code §413.0115 and this section. Proposed new §133.5(e) provides that if the report to the Division does not meet the requirements of Labor Code §413.0115 and this section, the informal network or voluntary network may be held liable for any administrative violations. Labor Code §413.0115 and this section specifically require only the informal networks and the voluntary networks to report certain information to the Division. As such, should the informal network or the voluntary network not comply with Labor Code §413.0115 or this section, it may be held liable for any administrative violations. Proposed new §133.5(f) provides that the provisions of this rule shall expire on January 1, 2011. Labor Code §413.0115(b) provides that not later than January 1, 2011, each informal network or voluntary network must be certified as a workers' compensation health care network under Insurance Code Chapter 1305. In addition, the provisions of Labor Code §413.011(d-1) - (d-3) and (d-6) concerning the ability of an insurance carrier or the insurance carrier's authorized agent to use an informal network or voluntary network expire on January 1, 2011. As such, this section becomes unnecessary on or after January 1, 2011.

Brent Hatch, Policy Advisor, Policy and Research, has determined that for each year of the first five years the proposed sections will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the rule. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Brent Hatch, Policy Advisor, Policy and Research, has determined that for each year of the first five years that amended §133.2 and new §133.4 and §133.5 are in effect, the public benefit anticipated as a result of the administration and enforcement of the proposed amendments will be: (1) increased transparency of insurance carrier access to health care provider contractual fee arrangements with informal or voluntary networks; (2) enhanced Division access to the notification provided by the notifying entity and greater ability for the Division to enforce the application of its medical fee guidelines when necessary during medical fee dispute resolution; (3) improved communication between health care providers, informal or voluntary networks and insurance carriers regarding contractual fee arrangements prior to the initiation of medical fee disputes; (4) greater Division efficiency in maintaining the registration of voluntary and informal networks and improved knowledge of those networks that should seek certification by January 1, 2011; and (5) improved guidance for stakeholder conformance to newly enacted statutes.

It is anticipated that costs may be incurred by the informal network, the voluntary network, the insurance carrier, or the insurance carrier's authorized agent providing the notice to health care providers in the timeframe and manner required under proposed new §133.4. Specifically, proposed new §133.4 requires the initial notice to be sent to health care providers with contractual fee arrangements in effect on June 1, 2008, no later than September 1, 2008. For health care providers who enter into contractual fee arrangements with informal or voluntary networks after June 1, 2008, the initial notice is required no later than thirty (30) days after the effective date of the contract. Additional notices are to be sent to health care providers on a quarterly basis after the insurance carrier, or the insurance carrier's authorized agent, or the informal network, or the voluntary network sends the initial notice to the health care providers.

Additionally, proposed new §133.4 requires the party providing the notice to the health care provider to document the content of the notice, the delivery of the notice, to whom the notice was delivered, and the date of delivery. Proposed new §133.4 also requires documentation of the health care provider notice to be submitted to the Division upon request. Proposed §133.4 only restates the contractual arrangements required by Labor Code §413.011(d-1) and §413.0115(a). As such, no additional cost for amending contract language has been included in this cost estimate.

Proposed new §133.4 allows the insurance carrier, the insurance carrier's authorized agent, or the informal or voluntary network, the flexibility to determine which entity will provide the notice to affected health care providers, as well as the flexibility to deliver and document the health care provider notice using whatever method best fits its business needs so long as the notice contains the required information, is delivered in accordance with the timeframes stated in proposed §133.4, and can be reproduced at the request of the Division. Consequently, as a result of this flexibility, costs for delivering and maintaining records of the health care provider notice will vary depending on the method of delivery and documentation chosen by the entity providing the health care provider notice. The cost of delivering the notice and maintaining that documentation will also vary depending on the number of health care providers for whom notice is provided. The Division estimates the cost range for providing the notice in the timeframes and manner set out in proposed §133.4 and for maintaining documentation of the health care provider notice to be between $.51 cents and $3.62 per health care provider notice per contracted entity. These numbers are based on an estimate of $.41 cents postage and $.10 cents for a page of paper and the estimated cost of purchasing a records management system designed to handle electronic notification to several thousand health care providers. It should be noted, however, that the estimated cost for distributing an electronic notice assumes the front-ended costs of purchasing an electronic system. As such, the cost of distributing a health care provider notice through electronic means will be negligible over time. The actual cost will be determined by the implementation and business plan and model of the insurance carrier, insurance carrier's authorized agent, the informal network or the voluntary network. In addition, the probable estimated cost to an insurance carrier, insurance carrier's authorized agent or informal or voluntary network to provide documentation of the health care provider notice to the Division upon request will vary depending on the number of notices that are requested by the Division and the length of each notice. However, it should be noted that the primary reasons the Division would initiate such a request would be to provide needed information for a medical fee dispute or to process a health care provider complaint regarding compliance with the proposed sections. The Division estimates the cost of copying the notice to be $.10 a page and assumes that an average copy of a health care provider notice will be less than five (5) pages in length.

Proposed new §133.5 requires each informal and voluntary network to comply with the requirements of Labor Code §413.0115 and report to the Division using the Division's on-line reporting system available through the Division's website. The Division anticipates the cost for complying with this proposed section to be negligible for all informal or voluntary networks with internet access since the reporting process has been set up by the Divi-

sion as an on-line form that can be reasonably completed in less than one hour per network. For entities without internet access, the Division estimates that the cost to obtain internet access for the purpose of complying with proposed §133.5 is approximately $20 per month.

It should be noted that the requirements under proposed new §133.4 and §133.5 and their cost impact on affected stakeholders expire on January 1, 2011, to correspond with Labor Code §413.011(d-6) and §413.0115(b), which require each informal or voluntary network to be certified in accordance with Insurance Code, Chapter 1305.

Any additional economic costs currently exist under existing rules or result from the enactment of Labor Code §413.011 (d-1) - (d-6) and §413.0111 and are not a result of the adoption, enforcement or administration of the proposed sections. There will be no difference in the cost of compliance between a large and small business as a result of the proposed sections. Although the Division has determined that this proposed section may have an adverse economic effect on one small business and one micro business, as explained below, it is neither legal nor feasible to waive the provisions of the proposed sections for small or micro businesses because the Labor Code requires equal application of these provisions to all affected individuals.

As required by the Government Code §2006.002(c), the Division has determined that the proposal may have an adverse economic effect on one small business and one micro business. The number of businesses operating as informal networks or voluntary networks was taken from Division records. Effective September 1, 2007, each informal network and voluntary network was required to provide certain information to the Division in accordance with Labor Code §413.0115. The Division contacted the executive contact person of the office listed by a majority of the entities that provided the information and researched the remainder of the entities not directly contacted in order to ascertain whether these entities met the statutory definition of a small business or micro-business under Government Code §2006.001(2). More small informal networks or voluntary networks could meet the statutory definition of a small business or micro-business and therefore be impacted by this rule proposal. However, the failure of these entities to comply with the reporting requirements of Labor Code §413.0115 makes it impossible to determine their numbers and whether this proposed rule may have an adverse economic effect on their small businesses or micro-businesses. Using the information compiled by the Division, the Division determined that one of the informal or voluntary networks that had registered with the Division as of this proposal, qualifies as a "small business" under the Government Code §2006.001(2) as it is an entity that is for profit, independently owned and operated, has fewer than 100 employees or less than $6 million in annual gross receipts. Additionally, the Division determined that one other informal or voluntary network qualifies as a "micro-business" under the Government Code §2006.001(1) because it does not employ more than 20 employees.

The Division anticipates that the impacted businesses will utilize the notification method that best suits the business needs of the informal or voluntary network, which includes the ability to electronically notify affected health care providers of any person that is given access to the informal or voluntary network's fee arrangement with that health care provider under the requisite provisions of proposed §133.4(d). Adverse economic impact will result to the two businesses because of storage of the health care provider notices sent under the proposed provisions of §133.4(d) since those notices may be requested by the Division during medical dispute resolution or to resolve complaints. Since proposed §133.4(b) additionally requires that a paper version of an electronic notice is made available upon request of the Division, the adverse economic impact to the affected two small and micro-businesses is approximately $200.00 for a period of 5 years. The amount is the projected cost for data storage for 5 years taking into account that informal or voluntary networks have to be certified not later than January 1, 2011 and requests for copies of required notification may reasonably stop 2 years thereafter. The anticipated cost of health care provider notification storage was provided by the small business adversely impacted by the proposed rule. The Division recognizes that the health care provider notice may be stored using a variety of methods, including electronic storage. Using information provided by the affected small business, the Division estimates that an informal or voluntary network the size of the impacted small business, with approximately 2,500 locations would be required to issue 10,000 notifications per year (1 notification per location per quarter). One possible electronic storage method that can be employed by a small business is to store an electronic image of the health care provider notice (jpg, gif, tif, etc.). At the typical image file size, the voluntary network would need 1.5GB - 4GB of storage capacity. Over 5 years, the estimated storage capacity needed by a small business would be 7.5GB - 20GB. Since storage costs over the years have increasingly diminished and the present price of a 100GB drive is about $200, it is expected that the data storage would equal that amount or less.

A second possible electronic storage method is the ability to "recreate" an image. If a small or micro business such as the two businesses impacted by proposed §133.4(b) are able to "recreate" an image at the request of the Division, then images would not need to be stored. A simple data table or electronic log could be created that would record the provider name and address, the content of the notice, the date of the notification, to whom it was sent, and the date of delivery. Using a data table or log storage method allows the notifying party to recreate the health care provider notice upon request of the Division. The Division estimates that using this electronic storage option would have an even lower cost than the first option.

REGULATORY FLEXIBILITY ANALYSIS

The other regulatory methods considered by the Division to accomplish the objectives of the proposal and to minimize any adverse impact on the two small and micro businesses affected included: (i) not adopting the proposed regulation, (ii) implementing different requirements or standards for the affected small business and micro-business and (iii) not requiring a paper copy when the affected small business or micro-business notify the contracted health care provider electronically.

*Not adopting the proposed regulation.* The Division rejected this approach because it would not accomplish the objective of the statute or the rule proposal and would not be consistent with the intent of the legislature. The primary objective of the proposed new §133.4 is to comply with the recently enacted requirement of Labor Code §413.011(d-2) which requires the Commissioner by rule to establish the time and manner in which an informal or voluntary network, or the carrier or carrier's authorized agent, as appropriate, would notify the health care provider of any person that is given access to the informal or voluntary network's fee arrangement with that health care provider.

*Implementing different requirements or standards for the affected small and micro-businesses.* If the proposal were not

made applicable to the affected small or micro-businesses, the proposed rule would not have an adverse economic effect on the small or micro-businesses or would have a smaller possible adverse economic effect on the small or micro-businesses.

However, while the proposed rule *might* have an adverse economic effect on the affected small business or micro-business, it may not always create an adverse economic impact. As noted in the cost note analysis, proposed §133.4 allows the insurance carrier, the carrier's agent or the informal or voluntary network the flexibility to determine which entity will provide the notice to affected health care providers as well as the flexibility to deliver and document the health care provider notice using whatever method best fits its business needs so long as the notice contains the required information, is delivered in accordance with the timeframes stated in proposed §133.4 and can be reproduced at the request of the Division. As such, it is possible that the small business and micro-business under discussion may determine that the insurance carrier or the carrier's agent will provide the requisite notice under this proposed section.

*Not requiring a paper copy when the affected small business and micro-business notify the contracted health care provider electronically.* The Division also considered this potentially less burdensome alternative for the affected micro-business and rejected it. The Division would initiate a request for a paper copy of a health care provider notice when it needs information to resolve a medical fee dispute or to process a health care provider complaint regarding compliance with this proposed section. In these instances, the Division would need documentation to determine whether the health care provider actually received the requisite notice under this proposed section and Labor Code §413.011. The Division could not rely on the assertion of the affected small business or micro business that it provided electronic notice if there is no supporting documentation. To do so would undermine the purpose and intent of Labor Code §413.011, which is to notify the health care provider within the time and manner provided by Commissioner rule. To determine compliance with this proposed section and Labor Code §413.011 documentation is necessary.

The Division has determined that no real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted to the Texas Department of Insurance, Division of Workers' Compensation no later than 5:00 p.m. on April 7, 2008. Comments may be submitted via the Internet through the Division's Internet website at *http://www.tdi.state.tx.us/wc/rules/proposedrules/toc.html* or by mailing or delivering your comments to Victoria Ortega, Legal Services, MS-4D, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744.

Any request for a public hearing should be submitted separately to the Office of General Counsel, MS-1, 7551 Metro Center Drive, Austin, Texas, 78744 before the close of the comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

The amendments and new sections are proposed under the Labor Code §§413.011, 413.0115, 408.0223 (repealed), 415.021, 415.023, 402.00111, and 402.061.

Section 413.011 requires the Commissioner by rule to establish the time and manner for an informal or voluntary network, or the carrier or the carrier's authorized agent, as appropriate to notify each health care provider of any person that is given access to the network's fee arrangements with the health care provider. Section 413.0115 requires voluntary networks and informal networks to report specific information to the Division. Former §408.0223 established the requirements of an insurance carrier network before its repeal by Chapter 265, Acts of the 79th Legislature, Regular Session, 2005, and constitutes the manner by which a voluntary network is defined. Section 415.021 provides that the Commissioner may assess an administrative penalty against a person who commits an administrative violation. Section 415.023 provides for certain administrative violations as a matter of practice. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

The following sections are affected by this proposal: Labor Code §§413.011, 413.0115, 408.0223 (repealed), 415.021, 415.023, 402.00111 and 402.061.

*§133.2. Definitions.*

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Bill review--Review of any aspect of a medical bill, including retrospective review, in accordance with the Act, rules, and the appropriate [~~Division~~] fee and treatment guidelines.

(2) Complete medical bill--A medical bill that contains all required fields as set forth in the billing instructions for the appropriate form specified in §133.10 of this chapter (relating to Required Billing Forms/Formats), or as specified for electronic medical bills in §133.500 (relating to Electronic Formats for Electronic Medical Bill Processing) [~~Chapter 135 of this title (relating to Electronic Medical Billing, Reimbursement, and Documentation)~~].

(3) Emergency--Either a medical or mental health emergency as follows:

(A) a medical emergency is the sudden onset of a medical condition manifested by acute symptoms of sufficient severity, including severe pain, that the absence of immediate medical attention could reasonably be expected to result in:

*(i)* placing the patient's health or bodily functions in serious jeopardy, or

*(ii)* serious dysfunction of any body organ or part;

(B) a mental health emergency is a condition that could reasonably be expected to present danger to the person experiencing the mental health condition or another person.

(4) Final action on a medical bill--

(A) sending a payment that makes the total reimbursement for that bill a fair and reasonable reimbursement in accordance with §134.1 of this title (relating to Medical Reimbursement); and/or

(B) denying a charge on the medical bill.

(5) Health care provider agent--A person or entity that the health care provider contracts with or utilizes for the purpose of fulfilling the health care provider's obligations for medical bill processing under the Labor Code or Division rules.

(6) Insurance carrier agent--A person or entity that the insurance carrier contracts with or utilizes for the purpose of providing claims services, including [~~or~~] fulfilling the insurance carrier's obligations for medical bill processing under the Labor Code or Division rules.

(7) Pharmacy processing agent--A person or entity that contracts with a pharmacy in accordance with Labor Code §413.0111, establishing an agent or assignee relationship, to process claims and act on behalf of the pharmacy under the terms and conditions of a contract related to services being billed. Such contracts may permit the agent or assignee to submit billings, request reconsideration, receive reimbursement, and seek medical dispute resolution for the pharmacy services billed.

(8) Retrospective review--The process of reviewing the medical necessity and reasonableness of health care that has been provided to an injured employee.

(9) In this chapter, the following terms have the meanings assigned by Labor Code §413.0115:

(A) Voluntary networks; and

(B) Informal networks

*§133.4. Written Notification to Health Care Providers of Contractual Agreements for Informal and Voluntary Networks.*

(a) Person. Under this section "person" is defined as an individual, partnership, corporation, hospital district, organization, business trust, estate trust, association, limited liability company, limited liability partnership or other entity to whom an informal network or voluntary network's fee arrangement with a health care provider is sold, leased, transferred, or conveyed on behalf of an insurance carrier. This term does not include an injured employee.

(b) Required notification. Each informal network or voluntary network, or the insurance carrier, or the insurance carrier's authorized agent, as appropriate, shall notify each affected health care provider of any person that is given access to the informal or voluntary network's fee arrangement with that health care provider, including, but not limited to, any person to whom the informal or voluntary network's fee arrangement with that health care provider is sold, leased, transferred, or conveyed, within the time and manner provided by this section.

(c) Content of notification. Notification to each contracted health care provider shall include:

(1) contact information for the informal or voluntary network, including a toll-free telephone number accessible to all contracted health care providers; and

(2) the following information in the body of the notice:

(A) contact information and identification of any insurance carrier, or other person that is given access to the informal or voluntary network's fee arrangement with a health care provider, including, but not limited to, any person to whom the informal or voluntary network's fee arrangement with the health care provider is sold, leased, transferred or conveyed; and

(B) the start date and any end date during which any person has been given access to the health care provider's contracted fee arrangement.

(d) Method of Notification. The information listed in subsection (c) of this section may be provided in an electronic format provided a paper version is available upon request by the Texas Department of Insurance, Division of Workers' Compensation (Division). A link to a website may be provided only if the website:

(1) contains the information stated in subsection (c)(2)(A) and (c)(2)(B) of this section; and

(2) is updated at least monthly; and

(3) contains current and correct information.

(e) Documentation: The informal or voluntary network, insurance carrier, or the insurance carrier's authorized agent, as appropriate, shall document the content of the notice, the delivery of the notice, to whom the notice was delivered, and the date of delivery. Failure to provide documentation upon the request of the Division or failure to provide notice that complies with the requirements of Labor Code §413.011 and this section creates a rebuttable presumption in a Division enforcement action and in a medical fee dispute that the health care provider did not receive the notification.

(f) Time of notification. Under this section:

(1) for contracts with health care providers in effect on June 1, 2008, initial notification must be made no later than September 1, 2008, and subsequent notices provided to health care providers in accordance with this section thereafter on a quarterly basis; and

(2) for contracts with health care providers entered into after June 1, 2008, initial notification must be made no later than the 30th day after the effective date of the contract and subsequent notices provided to health care providers in accordance with this section thereafter on a quarterly basis.

(g) Noncompliance. The insurance carrier is not entitled to pay a health care provider at a contracted fee if:

(1) the notice to the health care provider does not meet the criteria outlined in subsections (c)(2)(A) and (c)(2)(B) of this section; or

(2) the notice to the health care provider does not meet the requirements of Labor Code §413.011 and subsections (b) - (f) of this section; or

(3) there are no required contracts in accordance with Labor Code §413.011 (d-1) and §413.0115.

(h) Application of Division Fee Guideline. If the insurance carrier is not entitled to pay a health care provider at a contracted rate as outlined in subsection (g) of this section and as provided in Labor Code §413.011(d-1), the Division fee guidelines will apply.

(i) Administrative Violations. If notification to the health care provider does not meet the requirements of subsections (b) - (e) of this section, the insurance carrier may be held liable for any administrative violations.

(j) If a court of competent jurisdiction holds that any provision of this section is inconsistent with any statutes of this state, are unconstitutional, or are invalid for any reason, the remaining provisions of this section shall remain in full effect.

(k) In accordance with §413.011(d-6), the provisions of this rule shall expire on January 1, 2011.

*§133.5. Informal Network and Voluntary Network Reporting Requirements to the Division.*

(a) Reporting Requirement. Each informal network and voluntary network must provide the following information to the Texas Department of Insurance, Division of Workers' Compensation (Division):

(1) the informal network or voluntary network's name and federal employer identification number (FEIN);

(2) an executive contact for official correspondence for the informal network or voluntary network;

(3) a toll-free telephone number by which a health care provider may contact the informal network or voluntary network;

(4) a list of each insurance carrier with whom the informal network or voluntary network contracts, including the insurance carrier's FEIN; and

(5) a list of each entity or insurance carrier agent associated with the informal or voluntary network working on behalf of the insurance carrier, including contact information for each entity.

(b) Reporting Format. Reports, including changes, must be submitted through the Division's on-line reporting system accessible through the Division's website at www.tdi.state.tx.us.

(c) Reporting Timeframe. Each informal network and voluntary network that has a contract with an insurance carrier or an insurance carrier's authorized agent in effect on September 1, 2007, must report to the Division in accordance with this section no later than June 1, 2008. Except as otherwise provided in this subsection, informal and voluntary networks must report to the Division no later than the 30th day after the effective date of a contract signed with an insurance carrier or an insurance carrier's authorized agent.

(d) Reporting Changes. Each informal and voluntary network shall report any changes to the information provided under subsection (a) of this section to the Division not later than the 30th day after the effective date of the change in accordance with Labor Code §413.0115 and this section.

(e) Administrative Violations. If the report to the Division does not meet the requirements of Labor Code §413.0115 and this section, the informal or voluntary network may be held liable for any administrative violations.

(f) The provisions of this rule shall expire on January 1, 2011.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801084
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 804-4715

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# TITLE 34. PUBLIC FINANCE

## PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

### CHAPTER 7. PREPAID HIGHER EDUCATION TUITION PROGRAM

### SUBCHAPTER K. HIGHER EDUCATION SAVINGS PLAN

**34 TAC §7.103**

The Comptroller of Public Accounts proposes an amendment to §7.103, concerning tax benefits and securities laws exemptions. The amendments are proposed to ensure that contributions to savings trust accounts established through the higher education savings plan created by Education Code, Chapter 54, Subchapter G, do not exceed the amount necessary to pay the qualified higher education expenses of a designated beneficiary, to clarify language, and update citations.

The proposed amendments make substantive and technical changes to subsection (c), which concerns the prohibition of excess contributions to savings trust accounts. Amendments are proposed to change the method used by the board to determine the highest amount that may be contributed on behalf of a designated beneficiary, termed the "maximum account balance," from a rigid formula to a flexible method under which the board may adopt either the amount produced by using a proposed formula, or a lesser amount as determined by the board. The proposed amendments require the plan manager to maintain records to ensure that no account or combination of accounts exceeds the maximum account balance and provide for the aggregation of all accounts and prepaid higher education tuition contracts established for a designated beneficiary when assessing if an account balance exceeds the maximum amount.

John Heleman, Chief Revenue Estimator, has determined that, for the first five-year period the proposed rule amendment will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that, for each year of the first five years the proposed rule amendment is in effect, the public benefit anticipated as a result of enforcing the rule will be in establishing criteria and procedures to ensure that earnings in savings trust accounts established through Texas' higher education savings plan maintain their tax-exempt status under federal income tax laws. The proposed amendment would have no significant fiscal impart on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Written comments on the proposal may be addressed to Linda Fernandez, Manager, Texas Tomorrow Funds, P.O. Box 13407, Austin, Texas 78711-3407, or transmitted electronically to linda.fernandez@cpa.state.tx.us. A person who wishes to ensure that the board considers a comment made about this proposal must ensure that the board receives the comment not later than the 30th day after the issue date of the *Texas Register* in which this proposal appears. If the 30th day is a state or national holiday, Saturday, or Sunday, then the first workday after the 30th day is the deadline.

The amendments are proposed under Education Code, Chapter 54, Subchapter F, §54.618, which authorizes the board to adopt rules necessary for the implementation of the Prepaid Higher Education Tuition Program.

This amendment implements Education Code, §54.702, which requires the board to make changes necessary to maintain the income tax benefits or treatment provided by Internal Revenue Code, §529, and to adopt a policy to prevent contributions to an account in excess of the amount necessary to pay the qualified higher education expenses of the beneficiary.

*§7.103. Tax Benefits and Securities Laws Exemptions.*

(a) Intent to satisfy tax exempt requirements. This subchapter, the savings plan, each savings trust agreement, and each savings trust account hereunder are intended to satisfy all requirements of:

(1) Internal Revenue Code [ ~~of 1986~~], §529, [~~as amended,~~] and regulations thereunder; and

(2) federal securities laws.

(b) Media for making payments to savings trust accounts. Any payment of an amount due to a savings trust account under a savings trust agreement must be made in cash or by electronic funds transfer.

(c) Excess contributions prohibited.

(1) The maximum account balance for a savings trust account shall be determined and published annually and shall be equal to the lesser of seven times the cost of one year of undergraduate tuition, room, board, and required fees, as determined and published for financial aid purposes, at a U. S. eligible educational institution that the board determines to be among the highest cost U.S. undergraduate eligible educational institutions, with the sum so computed then being rounded down to the nearest $5,000 increment; or a lesser amount determined by the board. The amount of money that may be contributed [~~The owner of a savings trust account may not contribute to the account any sum that would cause the balance of the account to exceed the amount that is required to pay the qualified higher education expenses of the beneficiary of the account. Contributions to a savings trust account may not be made if, as a result thereof, the balance of the savings trust account would exceed the sum of four times the cost of one year of undergraduate tuition, fees, books, supplies, and room and board at the most expensive educational institution that is eligible for the savings plan, and three times the cost of one year of graduate school tuition, fees, books, supplies, and room and board at the most expensive graduate school that is eligible for the savings plan, which amount will be determined and published annually by the board. Contributions~~] to a savings trust account shall be limited to the amount, if any, by which the maximum account balance [~~foregoing sum~~] exceeds the balance of that savings trust account adjusted by the aggregation described in paragraph (3) of this subsection. To the extent that a [~~(together with the balance of all other savings trust accounts that are maintained under the savings plan for the beneficiary of that savings trust account). Any~~] contribution [~~that~~] exceeds the amount otherwise permitted by this section, such excess [~~that limit~~] will be promptly refunded, without interest or earnings, to the account's owner. A savings trust account for a designated beneficiary that has reached the maximum account balance may continue to accrue investment earnings. In the event that the board does not determine the maximum account balance for any year, the maximum account balance in effect during the previous year will continue in effect.

(2) The [~~A~~] plan manager shall monitor contributions to each savings trust account that is in the manager's custody, to ensure compliance with this subsection and any other applicable limits on contributions. The plan manager shall maintain records to ensure that the amounts paid or contributed on behalf of each designated beneficiary are not in excess of the funds required to meet the qualified higher education expenses of the beneficiary pursuant to Internal Revenue Code, §529(b)(6).

(3) In application of these rules, the plan manager shall [~~must~~] determine whether the beneficiary of a savings trust account is the beneficiary of any other qualified tuition program under Internal Revenue Code [~~of 1986~~], §529, [~~as amended,~~ ] that is maintained by the state, and shall [~~must~~] enforce the foregoing limitation on contributions by aggregating, as appropriate, the refund value of all prepaid tuition contracts and the balance of all savings trust accounts maintained by the state for the same designated beneficiary [~~incorporating all other such accounts into calculations of allowed contributions~~].

(d) Separate accountings. A plan manager shall maintain a separate accounting for each savings trust account in the manager's custody.

(e) Investment and earnings control prohibited. Except as provided in §7.106(f) of this title (relating to Plan Managers [~~investment alternatives~~]), neither the owner of a savings trust account nor the beneficiary of that account may control or direct the investment of:

(1) the principal of the account; or

(2) any earnings of the account.

(f) Pledge of interest as security prohibited. Neither the owner of a savings trust account nor the beneficiary of that account may:

(1) assign any interest in the account for the benefit of a creditor;

(2) use any interest in the account as security or collateral for a loan or other obligation; or

(3) otherwise alienate, sell, transfer, assign, pledge, encumber, or charge any interest in the account.

(g) Reports. A plan manager shall make reports that are required by:

(1) Internal Revenue Code [~~of 1986~~], §529[~~, as amended~~]; and

(2) any other applicable tax law.

(h) Policies and procedures. Except where in conflict with Education Code, Chapter 54, Subchapter G, or this subchapter, the board may adopt any policy or procedure, and such policy or procedure automatically amends each outstanding savings trust agreement as necessary for:

(1) the savings plan to obtain or maintain qualification as a qualified tuition program under Internal Revenue Code [~~of 1986~~], §529[~~, as amended~~];

(2) owners and beneficiaries to obtain or maintain the federal income tax benefits or favorable treatment that is provided by Internal Revenue Code [~~of 1986~~], §529[~~, as amended~~]; or

(3) the savings plan to obtain or maintain exemption from registration under federal securities laws.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801122
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 475-0387

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# PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

## CHAPTER 25. MEMBERSHIP CREDIT

## SUBCHAPTER B. COMPENSATION

**34 TAC §25.21**

The Teacher Retirement System of Texas (TRS) proposes amendments to §25.21 concerning compensation subject to deposit and credit. The amended rule is proposed to delete references to obsolete legislation related to compensation designated as health care supplementation.

Section 25.21 establishes detailed provisions describing the types of active member compensation that are creditable in the TRS pension plan for benefit computation purposes. Additionally, member contributions are based only on creditable compensation. This rule implements the primary statutory provision regarding creditable compensation, §822.201 of the Government Code relating to member compensation.

Amendments are needed to existing §25.21 to reflect legislative changes. In 2006, House Bill 1, 79th Legislature, Third Called Session, amended §822.201 regarding salary designated as compensation supplementation as excludable from creditable compensation by the election of the employee. However, this provision created a plan qualification concern, and the TRS Board of Trustees amended §25.21(c)(10) in 2006 to avoid the plan qualification issue, to be effective October 18, 2006 (31 TexReg 8563). Subsequently, in 2007, Senate Bill 1877, 80th Legislature, further amended §822.201 to remove the provision that had created this concern. The amendments presented now conform the TRS rule to the most recent amendments made in Senate Bill 1877 and remove the obsolete reference to House Bill 1.

The proposed amendments would provide that salary amounts designated as health care supplementation by an employee under Subchapter D, Chapter 22, Education Code, would be considered part of "salary and wages" and thus would be eligible to be considered creditable compensation. The proposed amendments also make minor wording changes with respect to certain educator incentive programs established by statute to conform the language of the rule to the language of the statute as amended by Senate Bill 1877. Other changes are technical and non-substantive.

Pattie Featherston, TRS Chief Operating Officer, estimates that for each year of the first five years the proposed rule will be in effect, enforcing or administering the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments. Ms. Featherston further explains that the proposed amendments updating the statutory reference related to the designation of health care supplementation as part of "salary and wages" for TRS purposes do not change current enforcement or administration of the rule. Ms. Featherston also states that the proposed amendments clarifying the designation of payments under certain statutory educator incentive programs as part of "salary and wages" for TRS purposes in conformity with Senate Bill 1877 clarifications reflect the manner in which payments associated with those programs have been administered for TRS purposes. Specifically, the amendments simply clarify that to be considered TRS-creditable, the payment must be for service rather than, for example, reimbursement of professional development tuition or fees paid under such programs; consequently, amounts excluded from "salary and wages" under Senate Bill 1877 and the conforming rule amendments are not estimated to be significant.

For each year of the first five years that the proposed rule amendments will be in effect, Ronnie Jung, TRS Executive Director, has determined that the public benefits expected as a result of the adoption of the proposed amendments will be to update the rule with current statutory references and to clarify the definition of "salary and wages" for determining what amounts received by public education employees are eligible as creditable compensation. Ms. Featherston has determined that for each year of the first five years the proposed rule amendments are in effect, the economic cost to persons required to comply with the amended rule will be negligible. There will be no measurable impact on a local economy or local employment because of the rule proposal, and, therefore, no local employment impact statement is required under §2001.022, Government Code. Moreover, the proposed amendments will have no adverse economic effect on small businesses or micro-businesses, and, therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River Street, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than thirty (30) days after publication of this notice and proposed rule.

Statutory Authority: The amended section is proposed under the following: §825.102, Government Code, which authorizes the Board to adopt rules for the administration of the funds of the retirement system.

Cross-reference to Statute: Senate Bill 1877, 80th Legislature, Regular Session (2007), which amends §822.201, Government Code, relating to TRS member compensation.

*§25.21. Compensation Subject to Deposit and Credit.*

(a) The contributions required from a member to the Teacher Retirement System of Texas are generally based upon the member's annual compensation. Benefits paid by the retirement system are also generally based in whole or in part upon the annual compensation credited to a member for certain school years. A member's annual compensation for any particular school year has the meaning given by the law and rules applicable for that year. Beginning with the 1981-1982 school year, and for school years thereafter, annual compensation consists of the salary and wages that are paid or payable to a member for employment which is eligible for membership in the retirement system during that school year.

(b) Some payments made by an employer to a member are not salary or wages, even though the payments may be otherwise considered as compensation under the employment contract or federal tax laws. In general salary and wages creditable and subject to deposit are those types of monetary compensation that are recurring base pay for periods of employment and that:

(1) are earned or accrue proportionally as the work is performed, so that a member terminating employment between pay periods is entitled to a proportional amount of the compensation based on either length of employment or amount of work performed;

(2) are paid or payable at fixed intervals, generally at the end of each pay period; and

(3) are not specifically excluded under subsection (d) of this section.

(c) The following types of monetary compensation are to be included in annual compensation:

(1) amounts deducted from regular pay for the state-deferred compensation program, for a tax-sheltered annuity, or for a deferred compensation arrangement qualifying under the United States Internal Revenue Code, §401(k);

(2) normal payroll deductions which are not tax-exempt or tax-deferred;

(3) additional compensation paid for additional duties, for longevity, for overtime worked as required by law, or for service in a particular location or specialty the employer determines requires additional compensation compared to other employees of that employer, provided that these payments clearly meet the requirements of subsection (b) of this section;

(4) delayed payments of lump-sum amounts which by law or contract should have been paid at fixed intervals and which otherwise meet the requirements of subsection (b) of this section provided the amounts are credited to the payroll period in which they were earned; and

(5) amounts withheld from regular pay under a cafeteria plan as provided by §25.22 of this title (relating to Contributions to Cafeteria Plans and Deferred Compensation);

(6) performance pay provided it meets the requirements of the Texas Government Code §822.201(b)(4) and §25.24 of this chapter (relating to Performance Pay);

(7) compensation received under the relevant parts of the awards for student achievement program under Subchapter N of Chapter 21, Education Code, the educator excellence awards program under Subchapter O of Chapter 21, Education Code, or a mentoring program under §21.458, Education Code, that authorize compensation for service;

(8) a merit salary increase made under Education Code, §51.962;

(9) amounts deducted from regular pay for a qualified transportation benefit under Government Code §659.202; and

(10) compensation designated as health care supplementation by an employee under Subchapter D, Chapter 22, Education Code[~~, as amended by House Bill 1, 79th Legislature, Third Called Session. This paragraph modifies the provision of the retirement plan described in §822.201, Government Code, as amended by House Bill 1, 79th Legislature, Third Called Session, to the extent necessary for the retirement system to be a qualified plan~~].

(d) The following are excluded from annual compensation:

(1) allowances, including housing, car, and expense allowances;

(2) reimbursements for expenses;

(3) payments for accrued compensatory time for overtime worked or for accrued sick leave or vacation, except that continued payments of normal compensation when vacation or sick leave or compensatory time is actually taken by an employee will be included in annual compensation to the extent otherwise permitted by this section;

(4) benefits, except as provided in subsection (c)(1) of this section, which either are not subject to federal income tax or which will be subject to federal income tax in a future year;

(5) bonus and incentive payments , unless state law expressly provides that a type of bonus or incentive payment is to be considered TRS-creditable compensation or the payments otherwise qualify as performance pay under subsection (c)(6) of this section;

(6) employer payments for fringe benefits, including direct cash payments in lieu of fringe benefits, except as provided in §25.22 of this title (relating to Contributions to Cafeteria Plans and Deferred Compensation);

(7) payments, except as provided in subsection (c)(1), (2), (5), and (8)[~~(c)(1), (c)(2), (c)(5), and (c)(8)~~] of this section, made to third parties for the benefit of a member;

(8) payments for work as an independent contractor or consultant;

(9) all nonmonetary compensation;

(10) active employee health coverage or compensation supplementation or any other amount received by an employee under former Article 3.50-8, Insurance Code; former Chapter 1580, Insurance Code; Subchapter D, Chapter 22, Education Code, as that subchapter existed on January 1, 2006; or Rider 9, page III-39, Chapter 1330, Acts of the 78th Legislature, Regular Session, 2003 (the General Appropriations Act), regardless of whether the employee receives the amount in cash, uses it for payment of health care coverage, or uses it for any other option available by law;

(11) any other fringe benefit;

(12) payments that an employer intentionally does not include in salary and wages because they are not expected to be permanently recurring in each pay period of employment or because they are not considered base pay and that, for the protection of the actuarial soundness of the retirement system, the type of payment should not be included in the calculation of a lifetime retirement benefit intended to replace a percentage of the member's base pay at retirement; and

(13) payments for terminating employment or paid as an incentive to terminate employment. Examples of such payments include payments for contract buy-outs, amounts paid pursuant to an agreement in which the employee agrees to terminate employment or to waive or release rights to future employment, and amounts paid pursuant to early retirement incentive programs or other programs intended to increase the compensation paid to the employee upon receipt of the resignation of the employee or the waiver or release of rights to future employment. Increased compensation paid in the final year of employment prior to retirement that exceeds increases approved by the employer for all employees or classes of employees is presumed to be payment for terminating employment.

(e) The maximum amount of compensation of any member that may be taken into account under the retirement system shall not exceed $150,000 for plan years commencing on or after September 1, 1996. For plan years commencing on or after January 1, 2002, the maximum amount of compensation shall not exceed the limit contained in the Internal Revenue Code §401(a)(17)(A), 26 United States Code §401(a)(17)(A). For plan years beginning before January 1, 1997, in determining the compensation of any member for any year, the family aggregation rules of the Internal Revenue Code, §414(q)(6), 26 United States Code §414(q)(6) shall apply except the term "family" shall include only the spouse of the member and any lineal descendants of the member who have not attained age 19 before the end of the year. The limits set forth in the first two sentences of this subsection shall be increased from time to time, to reflect cost of living increases, in accordance with the Internal Revenue Code, §401(a)(17), 26 United States Code §401(a)(17). The dollar limitation prescribed in the first two sentences of this subsection shall not apply to limit the compensation of any person who first becomes a member before September 1, 1996. Furthermore, that limitation shall not apply for any period during which such limitation is repealed or is not enforced by the Internal Revenue Service with regard to governmental plans. In applying the limits described in this section, a plan year is September 1 through August 31.

(f) TRS may rely upon employer certifications in determining creditable compensation or may conduct an investigation to determine

whether any ineligible compensation has been reported. At the request of TRS, employers will provide copies of any records or information the retirement system requests. Such records may include, but are not limited to, copies of contracts, work agreements, salary schedules or addenda, board minutes, payroll records, or other materials that will assist the retirement system in making a determination.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 21, 2008.

TRD-200801054
Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 542-6438

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## SUBCHAPTER F. VETERAN'S (USERRA) SERVICE CREDIT

### 34 TAC §25.71

The Teacher Retirement System of Texas (TRS) proposes amendments to §25.71 concerning service credit for eligible active military duty under the Uniformed Services Employment and Re-Employment Rights Act (USERRA). TRS proposes the amendments to make time periods in the rule for TRS-covered employees consistent with similar provisions in general state law for state and local government employees.

Section 25.71 establishes the opportunity to establish TRS service credit for a TRS member who leaves a TRS-covered employer in order to perform military duty. A federal law known as the Uniformed Services Employment and Re-Employment Rights Act ("USERRA") requires employers and retirement plans to protect access to jobs and benefits for eligible returning employees. This TRS rule implements the primary state statutory provision regarding TRS service credit established pursuant to USERRA, §823.304 of the Government Code.

A feature of USERRA, federal regulations implementing USERRA, and §25.71 is a requirement that a returning member return to, or apply for, re-employment with the employer within a certain number of days of discharge in order to trigger USERRA protections. Currently, the TRS rule requires that the member return to or apply for re-employment with the TRS-covered employer within 31 days of discharge, if the member served for less than 90 days, or within 90 days of discharge if the member served for 90 days or more.

However, Chapter 613 of the Government Code also addresses this issue with respect to a public employee who leaves a state or local governmental entity position. Section 613.004(a) specifies a 90-day period for application for re-employment in order to trigger the state law protections specified in Chapter 613. The 90-day period is applicable without regard to the length of active duty.

Because of the possibility of confusion between this general state law and the specific TRS rule regarding the time periods for re-employment that determine eligibility to purchase USERRA service credit, TRS proposes amendments to §25.71 to match the 90-day period specified in general state law, regardless of the length of time of active duty.

The effect of the proposed amendments would be to permit a returning member up to 90 days to apply for, or return to re-employment, regardless of the length of active duty, and still be eligible to purchase USERRA service credit under TRS, assuming all other conditions are met. Additionally, the proposed amendments recognize that federal USERRA regulations would extend the 90-day period for re-employment if, for example, the employee returned with an injury or illness incurred in, or aggravated during, military service and needed up to two years for hospitalization or convalescence.

Pattie Featherston, TRS Chief Operating Officer, estimates that for each year of the first five years the proposed rule will be in effect, enforcing or administering the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

For each year of the first five years that the proposed rule amendments will be in effect, Ronnie Jung, TRS Executive Director, has determined that the public benefits expected as a result of the adoption of the proposed amendments will be to make time periods in §25.71 consistent with similar ones in general law for public employees of Texas state or local governments. Ms. Featherston has determined that for each year of the first five years the proposed rule amendments are in effect, the economic cost to persons required to comply with the amended rule will be negligible. There will be no measurable impact on a local economy or local employment because of the rule proposal, and, therefore, no local employment impact statement is required under §2001.022, Government Code. Moreover, the proposed amendments will have no adverse economic effect on small businesses or micro-businesses, and, therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River Street, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than thirty (30) days after publication of this notice and proposed rule.

Statutory Authority: The amended section is proposed under the following statutes: §825.102, Government Code, which authorizes the Board to adopt rules for the administration of the funds of the retirement system and for the transaction of the business of the Board; and §823.304, which authorizes the Board to adopt rules in order to comply with the federal law relating to USERRA service credit.

Cross-reference to Statute: The Uniformed Services Employment and Re-Employment Rights Act of 1994 (USERRA), 38 U.S.C. §4301 et seq. and §823.304, Government Code.

*§25.71. Service Credit for Eligible Active Military Duty under the Uniformed Services Employment and Re-Employment Rights Act.*

(a) A member may obtain service credit for active military duty in lieu of or in addition to military service credit under §25.61 of this title (relating to Service Credit for Eligible Military Duty) if the member is eligible to obtain such service credit under the Uniformed Services Employment and Re-Employment Rights Act (USERRA), 38 United States Code §4301 et seq.

(b) A member who leaves a position in the employ of a Teacher Retirement System of Texas (TRS) covered employer to perform duty, on a voluntary or involuntary basis, in the uniformed services, as defined in the USERRA, is eligible to obtain service or compensation credit under this section if the member receives an honorable discharge and returns to or applies for re-employment with a TRS covered employer within ninety (90) days of discharge or release from active military service. TRS shall consider the provisions of USERRA or regulations adopted pursuant to USERRA in determining eligibility of members who apply for or return to re-employment later than this period of time, due to illness or injury incurred in, or aggravated during, uniformed service.

[~~(1) within thirty-one (31) days of discharge, if the member serviced for less than ninety (90) days, or~~]

[~~(2) within ninety (90) days of discharge, if the member served for ninety (90) days or more~~]

(c) Notwithstanding any provisions of these rules to the contrary, contributions, benefits, and service credit with respect to qualified military service shall be provided in accordance with the Internal Revenue Code §414(u) and as required by USERRA.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 21, 2008.

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Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 542-6438

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# CHAPTER 29. BENEFITS
## SUBCHAPTER A. RETIREMENT

### 34 TAC §29.1

The Teacher Retirement System of Texas (TRS) proposes new §29.1, concerning eligibility for service retirement. The primary statutory provision relating to service retirement eligibility is §824.202 of the Texas Government Code. In 2005, §824.202 was amended to change the retirement eligibility requirements for new members joining TRS after a specific date. The intended date was September 1, 2007; however, the bill enacting the provision--Senate Bill 1691, 79th Legislature, Regular Session (2005)--inadvertently also contained the date "September 1, 2006." Consequently, a new rule is needed to clearly reflect as part of the written retirement plan terms the date that triggers the new service retirement eligibility requirements. Additionally, other statutory changes enacted in 2005 have made the administration of service retirement eligibility more complex, particularly with respect to members who were grandfathered with respect to certain provisions of state law repealed in 2005. The interplay of the grandfather provisions and the new retirement eligibility provisions require the adoption of a new rule to ensure that the written plan terms reflect how such members' eligibility for service retirement and benefits will be determined.

The proposed new rule addresses four topics, described as follows. First, the rule would clarify that the new service retirement eligibility requirements established in Senate Bill 1691 apply to persons joining TRS on or after September 1, 2007. Second, the rule would clarify that a member who is grandfathered under Senate Bill 1691 (i.e., a person for whom certain repealed provisions are continued in effect) but later terminates membership and then resumes membership on or after September 1, 2007, would retain grandfathered status. Third, the rule would clarify that a person who was a member before September 1, 2007, terminated membership by withdrawal of contributions, and then resumed membership on or after September 1, 2007, is subject to the new service retirement eligibility requirements, even if the person reinstates TRS credit cancelled by the withdrawal of contributions. Fourth, the rule would clarify that a person who was a member before September 1, 2007, whose membership terminated by absence from service but who did not withdraw contributions, and then resumed membership on or after September 1, 2007, and reactivated the account is eligible for service retirement based on the earliest date of service associated with the account.

Pattie Featherston, TRS Chief Operating Officer, estimates that for each year of the first five years the proposed rule will be in effect, enforcing or administering the proposed rule would have the following foreseeable implications relating to cost or revenues of the state or local governments. There is an anticipated reduction in actuarial costs to TRS due to the establishment of new service retirement eligibility requirements, but the reduction results from the enactment of Senate Bill 1691; the clarification in the proposed rule of the date of membership that will trigger the new eligibility requirements is not anticipated to affect the reduction in actuarial costs estimated during the enactment of Senate Bill 1691 since the clarification is consistent with the September 1, 2007 date stated in the bill. Additionally, the provision expressly stating that the new eligibility requirements apply to a person who was a member before September 1, 2007, terminated membership by withdrawal of contributions, and then resumed membership on or after September 1, 2007, is anticipated to reduce actuarial costs to TRS, but the reduction is the result of enactment of Senate Bill 1691. Enforcing or administering the other provisions of the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments because, in the first five years the proposed rule is in effect, TRS anticipates a negligible number of grandfathered members who will terminate membership and then resume TRS participation on or after September 1, 2007, and a negligible number of members who resume TRS membership on or after September 1, 2007, after prior termination of membership by absence from service.

For each year of the first five years that the proposed rule will be in effect, Ronnie Jung, TRS Executive Director, has determined that the public benefits expected as a result of the adoption of the proposed rule will be to reflect in the written retirement plan terms the date that triggers the new service retirement eligibility requirements under the amended statute, §824.202 of the Texas Government Code, and to thereby ensure that the plan clearly identifies which members' eligibility for service retirement and benefits are affected by the new requirements. Ms. Featherston has determined that for each year of the first five years the proposed rule is in effect, there will be no economic cost to persons required to comply with the new rule because it would provide an additional annual cohort of members the advantages of service retirement eligibility requirements under law applicable to those who became members before September 1, 2007, rather

than before September 1, 2006; additionally, the new rule would provide for favorable treatment of the grandfathered status of members who terminate and return to TRS on or after September 1, 2007, and of service retirement eligibility for individuals whose membership terminates because of absence from service without withdrawal of contributions and then return to membership on or after September 1, 2007. Any economic cost to persons required to comply with the provision of the rule that clarifies that other members who terminate and return to TRS membership on or after September 1, 2007, are subject to the new service retirement eligibility provisions, is the result of the amended statute, §824.202. There will be no measurable impact on a local economy or local employment because of the rule proposal, and, therefore, no local employment impact statement is required under §2001.022, Texas Government Code. Moreover, the proposed new rule will have no adverse economic effect on small businesses or micro-businesses, and, therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Texas Government Code.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River Street, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than 30 days after publication of this notice and proposed rule.

Statutory Authority: The new section is proposed under the following statute: §825.102, Texas Government Code, which authorizes the Board to adopt rules for eligibility for membership, for the administration of the funds of the retirement system, and for the transaction of the business of the Board.

Cross-reference to Statute: Texas Government Code §822.003, which provides for the termination of membership; §822.004, which provides for the effect of termination; §822.006, which provides for the resumption of membership after termination; §823.501, which provides for credit cancelled by membership termination; and §824.202, which provides for the determination of a member's eligibility for service retirement; and Acts 2005, 79th Legislature, Chapter 1359 (Senate Bill 1691), §58, which continues certain repealed laws in effect with respect to persons who meet the grandfathering requirements set out in that Act.

*§29.1. Eligibility for Service Retirement.*

(a) The provisions of subsections (a-1) and (b-1) of §824.202, Texas Government Code, apply only to a person who becomes a member of the retirement system on or after September 1, 2007, notwithstanding the reference to the date of September 1, 2006 stated in those subsections.

(b) A member who met at least one of the requirements of §51.12(a) of this title (relating to Applicability of Certain Laws in Effect Before September 1, 2005) by August 31, 2005, before termination of membership through withdrawal of member contributions or absence from service shall be considered as continuing to be eligible to be governed by provisions of state law as described under §51.12(a) of this title upon resumption of membership on or after September 1, 2007.

(c) A person who was a member of the retirement system before September 1, 2007, but who terminates membership through withdrawal of accumulated contributions, then resumes membership on or after September 1, 2007, is subject to the provisions of subsections (a-1) and (b-1) of §824.202, Texas Government Code, regardless of whether the withdrawn service credit is reinstated.

(d) The eligibility for service retirement of a member who terminates membership due to absence from service without withdrawal of contributions and reactivates the account under §823.501(f), Texas Government Code, on or after September 1, 2007, shall be determined based on the earliest date of service associated with the account.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 21, 2008.

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Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 542-6438

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# CHAPTER 31. EMPLOYMENT AFTER RETIREMENT

## SUBCHAPTER B. EMPLOYMENT AFTER SERVICE RETIREMENT

### 34 TAC §31.15

The Teacher Retirement System of Texas (TRS) proposes amendments to §31.15, concerning the six-month exception to forfeiture of retirement annuity because of employment after retirement.

Retirees who return to work after retirement with a TRS-covered employer are limited in the amount of work they may perform without forfeiting annuity payments. Generally, beginning in the school year after they retire, retirees may work up to six months in full-time employment without forfeiting an annuity and then the monthly annuity is forfeited for any month in which the retiree works after the sixth month. The recent move to a delayed start of school until late August resulted in more retirees having to work into June to complete the school year and the loss of the annuity for June based on only a few days of work. Amending §824.602 of the Texas Government Code (relating to exceptions to the general rule of forfeiture of retirement annuity for employment after retirement), Senate Bill 1039 (80th Legislature, Regular Session, 2007) provided relief for these retirees working under the six-month exception by authorizing the payment of the June annuity if the retiree could not complete all work under the contract by May 31 and the work did not extend beyond June 15 of that year. Further, many retirees lost annuity payments during the summer months because of attendance or participation in professional development activities. Senate Bill 1039 also addressed this concern by clarifying that attendance or participation in these types of activities is not considered work for purposes of the six-month exception.

Amendments are needed to existing §31.15 to reflect these legislative changes. The amendments presented now conform the TRS rule to these most recent legislative changes and clarify when the changes take effect.

The proposed amendments provide that a retiree working under the six-month exception may work into June but no later than June 15 without forfeiting the annuity for June provided the work required under a work agreement or employment contract cannot be completed by May 31. The amendments also clarify that

attendance or participation in professional development activities that are not included in the total number of required days of work under the contract or work agreement are not considered work for purposes of this exception. Days of attendance or participation in professional development activities, in-service training, continuing education, or similar activities that are included in the number of days required under the employment contract or work agreement are not protected by these amendments and will result in the forfeiture of annuity if the attendance or participation occurs in any month in excess of six months (unless the attendance or participation occurs in June but no later than June 15).

Pattie Featherston, TRS Chief Operating Officer, estimates that for each year of the first five years the proposed amendments will be in effect, enforcing or administering the amended rule will not have a significant implication relating to cost or revenues of the state government and will not have foreseeable implications relating to cost or revenues of local governments; any fiscal implications would be the result of legislative enactments.

For each year of the first five years that the proposed amendments will be in effect, Ronnie Jung, TRS Executive Director, has determined that the public benefits expected as a result of the adoption of the amended rule will be to provide greater clarity and notice to retirees and employers regarding laws thereby preventing the inadvertent forfeiture of annuity checks by retirees who work in public education in June because of a later end date to a school year. Ms. Featherston has determined that for each year of the first five years the proposed amendments are in effect, there will be no economic cost to persons required to comply with the amended rule. There will be no measurable impact on a local economy or local employment because of the proposal, and, therefore, no local employment impact statement is required under §2001.022, Texas Government Code. Moreover, the proposed amendments will have no adverse economic effect on small businesses or micro-businesses, and, therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Texas Government Code.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River Street, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than thirty (30) days after publication of this notice and proposed rule.

Statutory Authority: The amendments are proposed under the following sections of the Texas Government Code: §824.601, which authorizes the retirement system to adopt rules necessary for administering Subchapter G (relating to Loss of Benefits on Resumption of Service) of Chapter 824; and §825.102, which authorizes the Board to adopt rules for eligibility for membership, the administration of the funds of the retirement system, and for the transaction of the business of the Board.

Cross-reference to Statute: The proposed amendments affect the following statutes in the Texas Government Code: §824.601, Texas Government Code, which provides for the loss of benefits on resumption of service; §824.602, Texas Government Code, which provides for exceptions to the general rule of forfeiture of retirement annuity for employment after retirement; and Act of May 17, 2007, 80th Legislature, Regular Session, Chapter 537, Senate Bill 1039, §1 (effective June 16, 2007), which provides that the amendments made by that act to §824.602, Texas Government Code, relating to the six-month exception, apply only to a retiree of TRS who resumes employment with a Texas public educational institution on or after the effective date of that act, or June 16, 2007.

*§31.15. Six-Month Exception.*

(a) Any person receiving a service retirement annuity, who retired after January 1, 2001, may, without forfeiting payment of the annuity, be employed on as much as full time for no more than six months in a school year if the work meets the requirements in subsection (b) of this section and the person complies with the requirements of subsection (c) of this section. Employment by a third party entity is considered employment by a Texas public educational institution unless the retiree does not perform duties or provide services on behalf of or for the benefit of the institution or the retiree was first employed by the third party entity before May 24, 2003.

(b) The work must occur:

(1) in no more than six months in a school year; and

(2) in a school year that begins after the retiree's effective date of retirement or no earlier than October 1 if the effective date of retirement is August 31. Except in cases set forth in §31.18 of this title [~~chapter~~] (relating to Bus Driver Exception), employment in a full-time position during any month in the school year in which the retiree retired results in the forfeiture of annuity for that month without regard to the number of days worked.

(c) A person who retired after January 1, 2001, and who, during a school year, has already used the exception described in §31.13 of this title [~~chapter~~] (relating to Substitute Service) or §31.14 of this title [~~chapter~~] (relating to One-half Time Employment) is eligible for the exception described in this section during the same school year. However, the permissible substitute service, the employment for work at no more than half time during the same school year, and any combination in the same calendar month of substitute service and one-half time employment must be included in the six months of employment allowed under this section. The six-month exception will be allowed so long as the retiree is eligible and is reported under that exception by the employer. A retiree using the six-month exception must use the first six months of a school year in which any work occurs. In the event the retiree wants to use the six-month exception and has not been reported in that manner, the reporting entity must notify TRS in writing by amending the previous TRS 118, Employment of Retired Member(s), report(s).

(d) Except as provided in subsections (h) and (i) of this section, a [~~A~~] person who retired after January 1, 2001, and is using the six-month exception, will forfeit an annuity payment for any month in the school year for work in excess of the six-month period. This applies even if the work would otherwise qualify for an exception under §31.13 of this title [~~chapter~~] (relating to Substitute Service) for substitute work or for exceptions applicable to one-half time or less employment, employment as a bus driver, employment in an acute shortage area, or employment as a principal or assistant principal.

(e) A retiree may elect to revoke the six month exception by submitting the election in writing and returning any ineligible payments.

(f) A retiree employed under the six-month exception who, during the same school year, also works as a substitute or one-half time or less may not be employed in or reported under the substitute or one-half time category during the remaining months of the school year.

(g) Paid time off, including sick leave, vacation leave, and compensatory time for overtime worked, is employment for purposes of this section and must be reported to TRS as employment for the calendar month in which it is taken.

(h) Beginning with the 2007-2008 school year, a retiree working under the six-month exception does not forfeit the annuity for June for work performed in June if the work the retiree agreed to complete under the contract or work agreement cannot be completed by May 31 and the retiree does not work beyond June 15 of that year.

(i) For a retiree working under the six-month exception, time spent attending professional development classes or activities on or after June 16, 2007, is not considered work for purposes of this section provided the professional or staff development classes or activities are not included in the employee's total number of required days of work under a contract or work agreement.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Ronnie G. Jung
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Teacher Retirement System of Texas
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## SUBCHAPTER D. EMPLOYER PENSION SURCHARGE

### 34 TAC §31.41

The Teacher Retirement System of Texas (TRS) proposes amendments to §31.41 concerning the return to work employer pension surcharge.

In 2005, the Texas Legislature enacted a penalty or surcharge to be paid by TRS-covered employers who employed retirees. The pension surcharge is an amount equal to the member and state contribution rate on compensation paid to the retiree. Under the 2005 legislation, the pension surcharge was not owed on retirees who were reported by the TRS-covered employer as working in January 2005. TRS adopted rules to clarify that the pension surcharge was only owed on retirees working in TRS-covered positions. In addition to the exemption for retirees reported as working in January 2005, the surcharge was also not owed on retirees working less than one-half time, as substitutes, or in temporary positions. Experience with this amendment resulted in further legislative changes in 2007. Senate Bill 1846 (80th Legislature, Regular Session, 2007) exempts employers from paying the pension surcharge for the employment of retirees who retired before September 1, 2005.

Amendments are needed to existing rule §31.41 to reflect these legislative changes. The proposed amendments presented now conform the TRS rule to these most recent legislative changes and preserve the former requirements for historical purposes when making adjustments or correcting errors.

The proposed amendments clarify that the former requirements regarding the payment of a pension surcharge applied to the 2005-2006 and 2006-2007 school years. The proposal further clarifies that, beginning with the 2007-2008 school year, the pension surcharge is not owed on the employment of a retiree who retired before September 1, 2005.

Pattie Featherston, TRS Chief Operating Officer, estimates that, for each year of the first five years the proposed amended rule will be in effect, enforcing or administering the proposed amended rule will not have a significant implication relating to cost or revenues of the state or local governments; any fiscal implications would be the result of legislative enactments.

For each year of the first five years that the proposed amended rule will be in effect, Ronnie Jung, TRS Executive Director, has determined that the public benefits expected as a result of the adoption of the proposed amendments will be to update and to clarify the rules to reflect related legislative changes in 2005 and 2007 and to clarify the application of the surcharge requirement. Ms. Featherston, TRS Chief Operating Officer, has determined that, for each year of the first five years the proposed amended rule is in effect, there will be no economic cost to persons required to comply with the amended rule. Rather, Ms. Featherston finds that the legislative enactment will expand the number of TRS retirees for which hiring school districts will be exempt from return-to-work-related surcharge for the pension fund. There will be no measurable impact on a local economy or local employment because of the rule proposal; therefore, no local employment impact statement is required under §2001.022, Government Code. Moreover, the proposed amended rule will have no adverse economic effect on small businesses or micro-businesses, therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River Street, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than thirty (30) days after publication of this notice and proposed rule.

Statutory Authority: The amended rule is proposed under §825.102, Government Code, which authorizes the Board to adopt rules for the administration of the funds of the retirement system.

Cross-reference to Statute: The proposed amended rule affects §825.4092, Government Code, which provides for employer contributions (surcharges) for employed retirees, and Act of May 27, 2007, 80th Leg., R.S., ch. 1389, S.B. 1846, §3 and §7, which provides that the amendments made by that act to §825.4092, Government Code, relating to the return to work employer pension surcharge, apply only to an employer contribution required to be made under that section on or after September 1, 2007.

*§31.41. Return to Work Employer Pension Surcharge.*

(a) For each report month a retiree is working in a TRS-covered position and reported on the Employment of Retired Members Report, the employer that reports the retiree shall pay to the Teacher Retirement System of Texas (TRS) a surcharge based on the retiree's salary paid that report month. For purposes of this section, the employer is the reporting entity that reports the employment of the retiree and the criteria used to determine if the retiree is working in a TRS-covered position are the same as the criteria for determining employment eligible for TRS membership, except that a retiree reported as a substitute must meet the requirements of §31.1(b) of this title for the surcharge not to apply. For the 2005-2006 school year only, a retiree who retired before September 1, 2005 and is employed for a period of more than 4 1/2 months due to the enrollment of students displaced by Hurricane Katrina may be considered a temporary employee whose employment is not subject to the surcharge under this section.

(b) The surcharge amount that must be paid by the employer for each retiree working in a TRS-covered position is an amount that is derived by applying a percentage to the retiree's salary. The percentage applied to the retiree's salary is an amount set by the Board of Trustees and is based on member contribution rate and the state pension contribution rate.

(c) The surcharge is due from each employer that reports a retiree as working as described in this section on or after September 1, 2005, beginning with the report month for September 2005.

(d) For the 2005-2006 and 2006-2007 school years, the [~~The~~] surcharge is not owed by the employer for any retiree reported by that employer on the Employment of Retired Members Report for the report month of January 2005. Beginning with the 2007-2008 school year, the surcharge is not owed by the employer for any retiree employed who retired from the retirement system before September 1, 2005.

(e) The surcharge is not owed by the employer for a retiree that is reported as working under the exception for Substitute Service as provided in §31.13 of this title unless that retiree combines Substitute Service under §31.13 of this title with other TRS-covered employment in the same calendar month. For each calendar month that the retiree combines substitute service and other TRS-covered employment, the surcharge is owed by the employer that reports the retiree on all compensation earned by the retiree, including compensation for the substitute service.

(f) The surcharge is owed by the employer on any retiree who is working for a third party entity but serving in a TRS-covered position and who is considered an employee of that employer under §824.601(d) of the Government Code.

(g) If a retiree is employed concurrently in more than one position that is not eligible for TRS membership, the surcharge is owed if the combined employment is eligible for membership under §25.6 of this title. If the employment is with more than one employer, the surcharge is owed by each employer.

(h) If a retiree is employed concurrently in more than one position and one of the positions is eligible for TRS membership and one is not, the surcharge is owed on the combined employment. If the employment is with more than one employer, the surcharge is owed by each employer.

(i) If a retiree is employed in a position eligible for TRS membership, the surcharge is owed by each employer on all subsequent employment with a TRS-covered employer for the same school year.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Ronnie G. Jung
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## CHAPTER 35. PAYMENTS BY TRS

**34 TAC §35.2**

The Teacher Retirement System of Texas (TRS) proposes amendments to §35.2, concerning direct rollovers from TRS.

Section 35.2 recognizes the opportunity available under federal tax law for a person receiving an eligible distribution from TRS to make a rollover of that distribution to another eligible retirement plan, including an individual retirement account (IRA). Until the enactment of the federal Pension Protection Act of 2006, a rollover could be made only by the following persons: a TRS member or retiree; an alternate payee of a TRS member or retiree (i.e., a spouse or former spouse receiving payment of part of the participant's benefit under a qualified domestic relations order (QDRO)); or a surviving spouse of a TRS member or retiree. The Pension Protection Act now authorizes retirement plans to allow an eligible nonspouse beneficiary to rollover a payment that is otherwise eligible for rollover, such as a lump sum death benefit.

The proposed amendments to §35.2 would formally include this opportunity as a feature of the TRS retirement plan.

To be eligible, the nonspouse beneficiary must be an individual or a trust that qualifies under federal tax law. Under federal tax law, an organization, such as a charity, or an estate named as beneficiary is not eligible to use this rollover provision.

Pattie Featherston, TRS Chief Operating Officer, estimates that for each year of the first five years the proposed rule will be in effect, enforcing or administering the proposed rule does not have foreseeable implications relating to cost or revenues of the state or local governments.

For each year of the first five years that the proposed rule amendments will be in effect, Ronnie Jung, TRS Executive Director, has determined that the public benefits expected as a result of the adoption of the proposed amendments will be to provide greater clarity and notice in the plan provisions themselves that such rollovers are permitted. Ms. Featherston has determined that for each year of the first five years the proposed rule amendments are in effect, there will be no economic cost to persons required to comply with the amended rule. Rather, states Ms. Featherston, the proposed amendments will provide additional notice to nonspouse beneficiaries of eligible rollover distributions; the opportunity to rollover an eligible distribution can provide an economic benefit because a rollover can be used to defer federal income tax on an eligible distribution from TRS. There will be no measurable impact on a local economy or local employment because of the rule proposal, and, therefore, no local employment impact statement is required under §2001.022, Government Code. Moreover, the proposed amendments will have no adverse economic effect on small businesses or micro-businesses, and, therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River Street, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than thirty (30) days after publication of this notice and proposed rule.

Statutory Authority: The amended section is proposed under the following statutes: §825.102, Government Code, which authorizes the Board to adopt rules for the administration of the funds of the retirement system and for the transaction of the business of the Board.

Cross-reference to Statute: §825.509, Government Code; Internal Revenue Code of 1986, §401(a)(31) (26 U.S.C. §401(a)(31); and The Pension Protection Act of 2006 (Pub.L. 109-280, Aug. 17, 2006, 120 Stat. 780), §829(a)(1) and (b), amending the Internal Revenue Code of 1986, §402(c)(11) (26 U.S.C. §402(c)(11).

*§35.2. Direct Rollovers from TRS.*

(a) A distributee of an eligible rollover distribution from the Teacher Retirement System of Texas (TRS) may elect to have the distribution paid directly to an eligible retirement plan by a direct rollover, to the extent required by Internal Revenue Code of 1986 (IRC), as amended, and guidance issued thereunder.

(b) To the extent permitted under the IRC, as amended, an individual beneficiary of a TRS participant, other than a surviving spouse or alternate payee, who is a distributee of an eligible rollover distribution from TRS may elect to have the distribution paid directly to a traditional individual retirement account (IRA) that shall be treated as an inherited IRA. A trust that is a beneficiary may be treated as a beneficiary eligible to make such an election only to the extent permitted under the IRC, as amended.

(c) [~~(b)~~] TRS shall develop procedures to implement this section in accordance with the Internal Revenue Code of 1986, §401(a)(31), as amended, and related regulations. Terms used in this section shall have the meaning assigned in the IRC [~~Internal Revenue Code of 1986~~], as amended.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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# CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS
## SUBCHAPTER A. RETIREE HEALTH CARE BENEFITS (TRS-CARE)

**34 TAC §41.4**

The Teacher Retirement System of Texas (TRS) proposes amendments to §41.4 concerning the employer health benefit surcharge.

Section 41.4 implements the statutory health benefit surcharge owed by a TRS covered employer for each month that the employer reports that a retiree enrolled in TRS-Care is working in a TRS-covered position. The rule currently provides that, among other exceptions, the surcharge is not owed by a particular employer on retirees enrolled in TRS-Care who were reported working by that employer for the report month of January 2005. Provisions of Senate Bill 1846 (80th Legislature, Regular Session, 2007) ("S.B. 1846") now exempt reporting employers from paying the health benefit surcharge for retirees who retired from TRS before September 1, 2005. In response to S.B. 1846, TRS proposes the amendments to §41.4 described below.

Substantive proposed changes to §41.4 are described in this paragraph. A proposed amendment to existing subsection (g) clarifies that it will only apply during the 2005-2006 and 2006-2007 school years. This proposed amendment maintains the status quo for these past two years under then existing law. A proposed new subsection (h) will apply to the 2007-2008 school year and thereafter. Under this proposed new subsection (h), the health benefit surcharge will not be owed by any employer for any retiree who retired from TRS before September 1, 2005. In contrast to subsection (g), this new subsection (h) contains no references to retirees reported by that employer for the report month of January 2005. Also, in contrast to existing paragraph (g)(2), proposed new subsection (h) does not address retirees reported by a second employer that consolidates with the first employer on or before September 1, 2005. Such language is not necessary in light of the fact that the health benefit surcharge will not be owed by an employer for any retiree employed by that employer who retired from TRS before September 1, 2005.

Proposed non-substantive changes to §41.4 are described in this paragraph. Language at the end of subsection (b) is proposed for deletion because it is no longer needed to address a prior inconsistency between other TRS rules regarding the determination of substitute employment for different purposes--§31.1(b), which defines a substitute for purposes of employment after retirement, and §25.4(b), which defines a substitute for purposes of determining employment eligible for TRS membership. Those two sections have been amended to be consistent with each other, so the reference in §41.4 to §31.1(b) is no longer necessary and could be a source of confusion if left in. Proposed language is added to re-lettered subsection (m) of §41.4 to clarify this subsection. References to various subsections are proposed for re-lettering in light of the proposed addition of new subsection (h).

Pattie Featherston, TRS Chief Operating Officer, estimates that for each year of the first five years the proposed amended rule will be in effect, enforcing or administering the proposed amended rule will not have a significant implication relating to cost or revenues of the state or local governments; any fiscal implications would be the result of legislative enactments.

For each year of the first five years that the proposed amended rule will be in effect, Ronnie Jung, TRS Executive Director, has determined that the public benefits expected as a result of the adoption of the proposed amendments will be to update and to clarify the rules to reflect related legislative changes and to clarify the application of the employer health benefit surcharge requirement. Ms. Featherston, TRS Chief Operating Officer, has determined that for each year of the first five years the proposed amended rule is in effect, there will be no economic cost to persons required to comply with the amended rule. Rather, Ms. Featherston finds that the legislative enactment will expand the number of TRS retirees for which hiring school districts will be exempt from the return-to-work-related surcharge for health benefits. There will be no measurable impact on a local economy or local employment because of the rule proposal, and, therefore, no local employment impact statement is required under §2001.022, Government Code. Moreover, the proposed amended rule will have no adverse economic effect on small businesses or micro-businesses, and, therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River Street, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than thirty (30) days after publication of this notice and proposed rule.

Statutory Authority: The amended rule is proposed under §825.102, Government Code, which authorizes the Board to adopt rules for the administration of the funds of the retirement system.

Cross-reference to Statute: The proposed amended rule affects §825.4092, Government Code, which provides for employer contributions (surcharges) for employed retirees, and Act of May 27, 2007, 80th Leg., R.S., ch. 1389, S.B. 1846, §3 and §7, which provides that the amendments made by that act to §825.4092, Government Code, relating to the employer health benefit surcharge apply only to an employer contribution required to be made under that section on or after September 1, 2007.

*§41.4. Employer Health Benefit Surcharge.*

(a) When used in this section, the term "employer" has the meaning given in §821.001(7), Government Code.

(b) A retiree who is enrolled in the health benefits program ("TRS-Care") provided pursuant to the Texas Public School Retired Employees Group Benefits Act, is working in a TRS-covered position, and is reported on the Employment of Retired Members Report to the Teacher Retirement System of Texas ("TRS") shall submit the TRS-Care Employer Health Benefit Surcharge Information Form, promulgated by TRS, to the employer, providing details of the retiree's TRS-Care coverage tier, years of service credit, and category of enrollment, as well as the identification of all employers of the retiree and all employers of any other retiree enrolled under the same account identification number, as required by the form. The criteria used to determine if the retiree is working in a TRS-covered position are the same as the criteria for determining employment eligible for TRS membership[~~, except that a retiree reported as a substitute must meet the requirements of §31.1(b) of this title for the surcharge not to apply~~].

(c) The retiree must submit to the employer an updated Employer Health Benefit Surcharge form when changes occur in coverage or the employment status of any retiree or other individual enrolled under the same account identification number.

(d) For each report month a retiree is enrolled in TRS-Care, is working in a TRS-covered position, and is reported on the Employment of Retired Members Report, the employer that reports the retiree shall, using the information provided by the retiree to the employer on the Employer Health Benefit Surcharge form, pay monthly to the Retired School Employees Group Insurance Fund (the "Fund") a surcharge amount that is derived by taking the difference, if any, between:

(1) the monthly full cost, as set by the trustee, for all individuals (including a spouse and children, if any) enrolled under the same account identification number; and

(2) the monthly total premium, as set by the trustee, for all individuals (including a spouse and children, if any) enrolled under the same account identification number.

(e) The surcharge is also owed by the employer on any retiree who is enrolled in TRS-Care, is working for a third party entity but is serving in a TRS-covered position, and who is considered an employee of that employer under §824.601(d) of the Government Code.

(f) The surcharge under subsection (d) of this section is due from each employer that reports a retiree as working in a TRS-covered position on or after September 1, 2005, beginning with the report month for September 2005.

(g) For the 2005-2006 and 2006-2007 school years, the [~~The~~] surcharge under subsection (d) of this section is not owed:

(1) by an employer for any retiree reported by that employer on the Employment of Retired Members Report for the report month of January 2005;

(2) by an employer for any retiree reported by a second employer on the Employment of Retired Members Report for the report month of January 2005, if both employers are school districts that consolidate into a consolidated school district on or before September 1, 2005; or

(3) by an employer for a retiree reported as working under the exception for Substitute Service as provided in §31.13 of this title unless that retiree combines Substitute Service under §31.13 of this title with other TRS-covered employment in the same calendar month. For each calendar month that the retiree combines substitute service and other TRS-covered employment, the surcharge is owed by the employer that reports the retiree on all compensation earned by the retiree, including compensation for the substitute service.

(h) Beginning with the 2007-2008 school year, the surcharge under subsection (d) of this section is not owed:

(1) by an employer for any retiree employed by that employer who retired from TRS before September 1, 2005; or

(2) by an employer for a retiree reported as working under the exception for Substitute Service as provided in §31.13 of this title unless that retiree combines Substitute Service under §31.13 of this title with other TRS-covered employment in the same calendar month. For each calendar month that the retiree combines substitute service and other TRS-covered employment, the surcharge is owed by the employer that reports the retiree on all compensation earned by the retiree, including compensation for the substitute service.

(i) [~~(h)~~] An employer who reports to TRS the employment of a retiree who is enrolled in TRS-Care and is working in a TRS-covered position shall inform TRS as soon as possible in writing of the name, address, and telephone number of any other employer that employs the retiree or any other retiree who is also enrolled under the same account identification number.

(j) [~~(i)~~] If more than one employer reports the employment of a retiree who is enrolled in TRS-Care to TRS during any part of a month, the surcharge under subsection (d) of this section required to be paid into the Fund by each reporting employer for that month is the total amount of the surcharge due that month divided by the number of reporting employers. The pro rata share owed by each employer is not based on the number of hours respectively worked each week by the retiree for each employer, nor is it based on the number of days respectively worked during the month by the retiree for each employer.

(k) [~~(j)~~] If a retiree who is enrolled in TRS-Care is employed concurrently in more than one position that is not eligible for TRS membership, the surcharge is owed if the combined employment is eligible for membership under §25.6 of this title. If the employment is with more than one employer, the surcharge will be paid according to subsection (j) [~~(i)~~] of this section by each employer.

(l) [~~(k)~~] If a retiree who is enrolled in TRS-Care is employed concurrently in more than one position and one of the positions is eligible for TRS membership and one is not, the surcharge is owed on the combined employment. If the employment is with more than one employer, the surcharge will be paid according to subsection (j) [~~(i)~~] of this section by each employer.

(m) [~~(l)~~] If a retiree who is enrolled in TRS-Care is employed in a position eligible for TRS membership, the surcharge will be paid according to subsection (j) [~~(i)~~] of this section by each employer on all subsequent employment, whether eligible for membership or not, with a TRS-covered employer for the same school year.

(n) [~~(m)~~] Notwithstanding the above, for the 2005-2006 school year only, a retiree

(1) who retired before September 1, 2005,

(2) who is enrolled in TRS-Care, and

(3) who is employed for a period of more than four and one-half months due to the enrollment of students displaced by Hurricane Katrina may be considered a temporary employee whose employment is not subject to the surcharge under this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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# TITLE 37. PUBLIC SAFETY AND CORRECTIONS

## PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

### CHAPTER 15. DRIVER LICENSE RULES
### SUBCHAPTER B. APPLICATION REQUIREMENTS--ORIGINAL, RENEWAL, DUPLICATE, IDENTIFICATION CERTIFICATES

**37 TAC §15.24**

The Texas Department of Public Safety (Department) proposes amendments to §15.24 concerning Identification of Applicants. An amendment to §15.24 is necessary to prevent circumvention of the Texas identification requirements. Individuals, who cannot meet the current Texas identification requirements, obtain driver licenses and identification certificates issued by other states with identification standards not equal to or greater than those required in Texas. The individuals then use the out-of-state driver licenses and identification certificates, issued under inferior identification requirements, as a form of secondary identification to obtain Texas driver licenses and identification certificates. Additionally, individuals attempt to use traffic citations completed with unverified identifying information to obtain Texas driver licenses and identification certificates. These individuals contend that the citation is an original court order and should be considered as a form of secondary identification under the current rule. An amendment to this section, which would restrict the acceptable court orders to official name and gender changes, would eliminate this circumvention of the Texas identification requirements. Lastly, the Department proposes an amendment which would provide necessary uniformity regarding the validity period of acceptable federal documentation. The proposed amendment would require United States Bureau of Citizenship and Immigration Services documents to be issued for at least one year and with at least six months of validity remaining at the time of application.

Oscar Ybarra, Chief of Finance, has determined that. for each year of the first five-year period the rule proposal is in effect, there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. The cost to individuals who are required to comply with the rule as proposed will be the standard cost of obtaining a Texas driver license, commercial driver license, or identification certificate. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that, for each year of the first five-year period the rule proposal is in effect, the public benefit anticipated as a result of enforcing the rule will be to assist in the positive identification of an applicant for a Texas driver license, commercial driver license, or identification certificate.

The Department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule proposal. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Monica Ogilvie, Staff Attorney, Driver License Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0300, (512) 424-5231.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work, and Texas Transportation Code, §521.005.

Texas Government Code, §411.004(3), and Texas Transportation Code, §521.005 and §521.142 are affected by this proposal.

*§15.24. Identification of Applicants.*

All original applicants for a driver license or identification certificate must present proof of identity satisfactory to the department. All documents must be verifiable. There are three categories of documents that may be presented to establish proof of identity.

(1) Primary identification. These items are complete within themselves and require no supporting instruments: These documents must contain the applicant's complete name and full date of birth:

(A) Texas driver license (DL) or identification certificate (ID) with photo within two years of expiration date;

(B) unexpired United States passport;

(C) United States citizenship (naturalization) certificate with identifiable photo;

(D) unexpired United States Bureau of Citizenship and Immigration Services document issued for a period of at least one year and must be valid for no less than six (6) months from the date presented to the department with a completed application. The document must contain verifiable [~~with verified~~] data and identifiable photo; or,

(E) unexpired United States military ID card for active duty, reserve or retired personnel with identifiable photo.

(F) foreign passport with a visa issued by the United States Department of State (valid or expired) with unexpired I-94 marked valid for a fixed duration. The Form I-94 must have been issued for a period of at least one year and must be valid for no less than six (6) months from the date presented to the department with a completed application.

(G) foreign passport with a visa issued by the United States Department of State (valid or expired) with an I-94 marked valid for the duration of stay accompanied by appropriate documentation.

(2) Secondary identification. These items are recorded governmental documents (United States, 1 of the 50 states, a United States territory, District of Columbia or Canadian province):

(A) original or certified copy of a birth certificate issued by the appropriate State Bureau of Vital Statistics or equivalent agency;

(B) original or certified copy of United States Department of State Certification of Birth (issued to United States citizens born abroad); or

[~~(C) unexpired photo DL or photo ID issued by another (United States) state, US territory, the District of Columbia, or Canadian province;~~]

(C) [~~(D)~~] original or certified copy of court order with name and date of birth (DOB) indicating an official change of name and/or gender. [~~; or,~~]

[~~(E) for applicants born before 1961, the following items would be acceptable in this category:~~]

*~~(i)~~* ~~original or certified copy of Form DD-214;~~]

*~~(ii)~~* ~~original or certified copy of other state or federal governmental record that states name and DOB (such as United States census records or Social Security records).~~]

(3) Supporting identification. These items consist of other records or documents that aid examining personnel in establishing the identity of the applicant. The following items are not all inclusive. The examining or supervisory personnel may determine that an unlisted document meets the department's needs in establishing identity.

(A) school records;

(B) insurance policy (at least two years old);

(C) vehicle title;

(D) military records;

(E) unexpired military dependant identification card;

(F) original or certified copy of marriage license or divorce decree;

(G) voter registration card;

(H) Social Security card;

(I) pilot's license;

(J) concealed handgun license;

(K) Texas driver's license temporary receipt;

(L) unexpired photo [~~expired~~] DL or photo ID issued by another (United States) state, US territory, the District of Columbia or Canadian province [~~that is within two years of the expiration date~~];

(M) expired photo DL or photo ID issued by another (United States) state, US territory, the District of Columbia or Canadian province that is within two years of the expiration date [~~a foreign passport (with or without a United States Visa)~~];

(N) a consular document issued by a state or national government; or

(O) an offender identification card or similar form of identification issued by the Texas Department of Criminal Justice.

(4) Every original applicant must present:

(A) one piece of primary identification, or

(B) one piece of secondary identification plus two pieces of support identification; or,

(C) two pieces of secondary identification.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801029
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 424-2135

♦ ♦ ♦

**37 TAC §15.25**

The Texas Department of Public Safety proposes amendments to §15.25, concerning the address of applicants for an original, renewal or duplicate driver license, or identification certificate. Proposed amendments to §15.25 are necessary to prevent circumvention of the Texas application and residence requirements.

Oscar Ybarra, Chief of Finance, has determined that, for each year of the first five-year period the rule proposal is in effect, there will be no fiscal implications for state or local government or local economies.

Mr. Ybarra also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. The cost to individuals who are required to comply with the rule as proposed will be the standard cost of obtaining a Texas driver license, commercial driver license, or identification certificate. There is no anticipated negative impact on local employment.

In addition, Mr. Ybarra has also determined that, for each year of the first five-year period the rule proposal is in effect, the public benefit anticipated as a result of enforcing the rule will be to assist in the positive identification of an applicant for a Texas driver license, commercial driver license, or identification certificate.

The Department has determined that this proposal is not a "major environmental rule" as defined by Governmental Code, §2001.0225. "Major environmental rule" is defined to mean a rule that the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The Department has determined that Chapter 2007 of the Governmental Code does not apply to this rule proposal. Accordingly, the Department is not required to complete a takings impact assessment regarding this rule.

Comments on the proposal may be submitted to Monica Ogilvie, Staff Attorney, Driver License Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0300, (512) 424-5231.

The amendment is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work, and Texas Transportation Code, §521.005.

Texas Government Code, §411.004(3), and Texas Transportation Code, §521.005 and §521.142 are affected by this proposal.

*§15.25. Address.*

The address requirement for a driver license and identification certificate is:

(1) The applicant's [~~best~~] Texas residence address [~~obtainable~~] must be given. A business address is not acceptable[~~,~~ ~~unless the applicant is a traveling salesman or other transient, his Texas business address may be used~~]. Applicants may be required by the department to provide proof satisfactory to the department to establish the Texas residence address provided. All documents must be verifiable.

(2) The complete street address including apartment numbers and such terms as street, circle, drive, or court should be used whenever possible. The city, state, zip code, and type of residence must be shown as part of the address on all applications for driver licenses and identification certificates. The zip code may be a five or nine digit number until such time as the nine digit number is required by the department or postal authorities. In rural areas, route number and box number should be given. [~~If there is no mail delivery at the address shown, post office box number or other mailing address may be shown with the street address. This address is required for a Commercial Driver's License (CDL) and a nonCDL.~~]

(3) The application form also provides space for a mailing address. If there is no mail delivery at the address shown, then a post office box number or other mailing address must be shown in conjunction with the Texas residence address provided. If an applicant has a mailing address in addition to [~~other than~~] the Texas residence address, this address may include post offices boxes, [~~business addresses,~~] or other mailing locations. [~~A mailing address is required on a CDL. This address may be used with a Texas residence address on a nonCDL data card.~~]

(4) A mailing address is required to obtain a commercial driver license. [~~The city, state, and zip code must be shown as part of the address on all applications for driver's licenses and identification certificates. The zip code may be a five or nine digit number until such time as the nine digit number is required by the department or postal authorities.~~]

(5) A general delivery address must not be used except in very small communities when no street or route addresses are available.

(6) A post office box number is not acceptable if a better address can be obtained. The post office box number may only be listed in addition to a Texas residence address.

[~~(7) Apartment or residence hotel addresses may be given.~~]

[~~(8) Applicant's near relative's address may be accepted if Texas residence of the applicant is not permanent and if mail can be forwarded to the applicant.~~]

[~~(9) To insure delivery "In care of" should be used as a part of any address where mail is to be delivered to the address of another person.~~]

(7) [~~(10)~~] Military personnel and their dependents should give complete address such as: John Henry Smith, Co. B, 25th Inf., Camp Barkeley, Abilene, Texas. If a member of the armed forces has a residence address in Texas, it should be provided and used. A member of the armed forces may provide a residence address outside of Texas.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801030
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Earliest possible date of adoption: April 6, 2008
For further information, please call: (512) 424-2135

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# WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

## TITLE 10. COMMUNITY DEVELOPMENT

## PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

### CHAPTER 303. REGISTRATION

### SUBCHAPTER A. REGISTRATION OF BUILDERS

**10 TAC §303.20**

The Texas Residential Construction Commission withdraws the proposed amendments to §303.20 which appeared in the November 23, 2007, issue of the *Texas Register* (32 TexReg 8396).

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801119
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Effective date: February 25, 2008
For further information, please call: (512) 463-2886

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## TITLE 16. ECONOMIC REGULATION

## PART 9. TEXAS LOTTERY COMMISSION

### CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES

### SUBCHAPTER B. CONDUCT OF BINGO

**16 TAC §402.210**

The Texas Lottery Commission withdraws proposed new §402.210 which appeared in the October 5, 2007, issue of the *Texas Register* (32 TexReg 6962).

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801068
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: February 22, 2008
For further information, please call: (512) 344-5012

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**16 TAC §402.211**

The Texas Lottery Commission withdraws proposed new §402.211 which appeared in the October 5, 2007, issue of the *Texas Register* (32 TexReg 6962).

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801069
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: February 22, 2008
For further information, please call: (512) 344-5012

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## TITLE 22. EXAMINING BOARDS

## PART 9. TEXAS MEDICAL BOARD

### CHAPTER 162. SUPERVISION OF MEDICAL SCHOOL STUDENTS

**22 TAC §162.1**

The Texas Medical Board withdraws the proposed amendments to §162.1, concerning Supervision of Medical Students, which appeared in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6237).

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801112
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Effective date: February 25, 2008
For further information, please call: (512) 305-7016

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## PART 14. TEXAS OPTOMETRY BOARD

### CHAPTER 273. GENERAL RULES

**22 TAC §273.10**

The Texas Optometry Board withdraws the proposed amendments to §273.10 which appeared in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8651).

Filed with the Office of the Secretary of State on February 21, 2008.

TRD-200801046
Chris Kloeris
Executive Director
Texas Optometry Board
Effective date: February 21, 2008
For further information, please call: (512) 305-8502

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## CHAPTER 275. CONTINUING EDUCATION

**22 TAC §275.1**

The Texas Optometry Board withdraws the proposed amendments to §275.1 which appeared in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8652).

Filed with the Office of the Secretary of State on February 21, 2008.

TRD-200801045
Chris Kloeris
Executive Director
Texas Optometry Board
Effective date: February 21, 2008
For further information, please call: (512) 305-8502

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# TITLE 37. PUBLIC SAFETY AND CORRECTIONS

# PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

## CHAPTER 13. CONTROLLED SUBSTANCES
## SUBCHAPTER D. OFFICIAL PRESCRIPTIONS

**37 TAC §§13.71, 13.73, 13.76, 13.79, 13.84, 13.85**

The Texas Department of Public Safety withdraws the proposed amendments to §§13.71, 13.73, 13.76, 13.79, 13.84, and 13.85 which appeared in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8709).

Filed with the Office of the Secretary of State on February 21, 2008.

TRD-200801052
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: February 21, 2008
For further information, please call: (512) 424-2135

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## SUBCHAPTER I. RECORD KEEPING

**37 TAC §13.207**

The Texas Department of Public Safety withdraws the proposed amendments to §13.207 which appeared in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8712).

Filed with the Office of the Secretary of State on February 21, 2008.

TRD-200801053
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: February 21, 2008
For further information, please call: (512) 424-2135

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# PART 3. TEXAS YOUTH COMMISSION

## CHAPTER 97. SECURITY AND CONTROL
## SUBCHAPTER A. SECURITY AND CONTROL

**37 TAC §97.23**

The Texas Youth Commission withdraws the proposed repeal of §97.23 which appeared in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7860).

Filed with the Office of the Secretary of State on February 21, 2008.

TRD-200801065
Steve Foster
General Counsel
Texas Youth Commission
Effective date: February 21, 2008
For further information, please call: (512) 424-6475

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**37 TAC §97.23**

The Texas Youth Commission withdraws proposed new §97.23 which appeared in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7860).

Filed with the Office of the Secretary of State on February 21, 2008.

TRD-200801062
Steve Foster
General Counsel
Texas Youth Commission
Effective date: February 21, 2008
For further information, please call: (512) 424-6475

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# ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

## TITLE 1. ADMINISTRATION

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## PART 3. OFFICE OF THE ATTORNEY GENERAL

### CHAPTER 57. RENTAL-PURCHASE ACT COMPLIANCE

**1 TAC §57.1**

The Office of the Attorney General (OAG) adopts the repeal of 1 TAC Chapter 57, §57.1, concerning Rental-Purchase Act Compliance, without changes to the proposal as published in the January 4, 2008, issue of the *Texas Register* (33 TexReg 15).

Adoption of the repeal is necessary because the reasons for initially adopting the rule were determined to no longer exist as the result of an agency rule review conducted under Texas Government Code §2001.039, the findings of which were published in the January 4, 2008, issue of the *Texas Register* (33 TexReg 289).

An approved form rental-purchase agreement that may be used to satisfy the requirements of Texas Business and Commerce Code §§35.71 - 35.74 (the Rental-Purchase Act) will continue to be available from the Division Chief of the OAG's Consumer Protection Division at 300 W. 15th Street, Austin, Texas 78701. The form agreement will also be available to the public in a downloadable format on the agency website at http://www.oag.state.tx.us/consumer/consumer.shtml.

No comments were received regarding adoption of the proposed repeal.

The repeal is adopted pursuant to Texas Government Code §2001.039(c), which authorizes the repeal of administrative rules where the reasons for adopting the rules have been determine to no longer exist.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801089
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Effective date: March 13, 2008
Proposal publication date: January 4, 2008
*For more information regarding this publication, contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.*

### CHAPTER 58. PHYSICIAN JOINT NEGOTIATION

The Office of the Attorney General (OAG) adopts the repeal of 1 TAC Chapter 58, Subchapter A, §§58.1 - 58.6; Subchapter B, §§58.11 - 58.15; Subchapter C, §§58.21 - 58.26; Subchapter D, §§58.31 - 58.33; Subchapter E, §§58.41 - 58.42; and Subchapter F, §§58.51 - 58.53; concerning Physician Joint Negotiation. The repeal is adopted without changes to the proposed text as published in the January 4, 2008, issue of the *Texas Register* (33 TexReg 16).

Adoption of the repeal is necessary because the reasons for initially adopting the rule were determined to no longer exist as the result of an agency rule review conducted under Texas Government Code §2001.039, the findings of which were published in the January 4, 2008, issue of the *Texas Register* (33 TexReg 290).

No comments were received regarding proposed repeal.

#### SUBCHAPTER A. GENERAL

**1 TAC §§58.1 - 58.6**

The repeal is adopted pursuant to Texas Government Code §2001.039(c), which authorizes the repeal of administrative rules where the reasons for adopting the rules have been determine to no longer exist.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801090
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Effective date: March 13, 2008
Proposal publication date: January 4, 2008
*For more information regarding this publication, contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.*

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#### SUBCHAPTER B. APPLICATION REQUIREMENTS

**1 TAC §§58.11 - 58.15**

The repeal is adopted pursuant to Texas Government Code §2001.039(c), which authorizes the repeal of administrative rules where the reasons for adopting the rules have been determine to no longer exist.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200801091
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Effective date: March 13, 2008
Proposal publication date: January 4, 2008
*For more information regarding this publication, contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.*

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## SUBCHAPTER C. REVIEW OF APPLICATION

**1 TAC §§58.21 - 58.26**

The repeal is adopted pursuant to Texas Government Code §2001.039(c), which authorizes the repeal of administrative rules where the reasons for adopting the rules have been determine to no longer exist.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Stacey Napier
Deputy Attorney General
Office of the Attorney General
Effective date: March 13, 2008
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*For more information regarding this publication, contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.*

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## SUBCHAPTER D. REVIEW OF PROPOSED CONTRACTS

**1 TAC §§58.31 - 58.33**

The repeal is adopted pursuant to Texas Government Code §2001.039(c), which authorizes the repeal of administrative rules where the reasons for adopting the rules have been determine to no longer exist.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801093
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Effective date: March 13, 2008
Proposal publication date: January 4, 2008
*For more information regarding this publication, contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.*

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## SUBCHAPTER E. REMEDIAL MEASURES

**1 TAC §58.41, §58.42**

The repeal is adopted pursuant to Texas Government Code §2001.039(c), which authorizes the repeal of administrative rules where the reasons for adopting the rules have been determine to no longer exist.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801094
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Effective date: March 13, 2008
Proposal publication date: January 4, 2008
*For more information regarding this publication, contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.*

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## SUBCHAPTER F. SUBSEQUENT NEGOTIATIONS AND CONTRACT MODIFICATIONS

**1 TAC §§58.51 - 58.53**

The repeal is adopted pursuant to Texas Government Code §2001.039(c), which authorizes the repeal of administrative rules where the reasons for adopting the rules have been determine to no longer exist.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801095
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Effective date: March 13, 2008
Proposal publication date: January 4, 2008
*For more information regarding this publication, contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.*

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# TITLE 4. AGRICULTURE

## PART 1. TEXAS DEPARTMENT OF AGRICULTURE

### CHAPTER 1. GENERAL PROCEDURES
### SUBCHAPTER E. ADVISORY COMMITTEES

**4 TAC §1.211**

The Texas Department of Agriculture (the department) adopts new §1.211, concerning the Texas Organic Agriculture Industry Advisory Board, without changes to the proposal published in the January 18, 2008, issue of the *Texas Register* (33 TexReg 461).

New §1.211 adds the Texas Organic Agriculture Industry Advisory Board to the list of the department's advisory boards and committees, states the purpose and duties of the Board, and specifies how the Board will report to the department.

No comments were received on the proposal.

New §1.211 is adopted under the Texas Government Code, §2110.005, which requires that an agency that establishes an advisory Board adopt rules to state the purpose and tasks of the Board and manner in which the Board shall report to the agency; and §50C.002 which authorizes the Commissioner of Agriculture to appoint a the Texas Organic Agriculture Industry Advisory Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801088
Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: March 13, 2008
Proposal publication date: January 18, 2008
For further information, please call: (512) 463-4075

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# TITLE 13. CULTURAL RESOURCES

## PART 8. TEXAS FILM COMMISSION

### CHAPTER 121. TEXAS MOVING IMAGE INDUSTRY INCENTIVE PROGRAM

**13 TAC §§121.1 - 121.14**

The Office of the Governor, Texas Film Commission (Commission) adopts new Chapter 121, §§121.1 - 121.14, concerning Texas Moving Image Industry Incentive Program. Sections 121.2, 121.3, 121.5, 121.9, and 121.11 are adopted with changes to the proposed text as published in the January 18, 2008, issue of the *Texas Register* (33 TexReg 462). Sections 121.1, 121.4, 121.6 - 121.8, 121.10, and 121.12 - 121.14 are adopted without changes to the proposed text and will not be republished.

These rules establish the requirements and procedures for the Texas Moving Image Industry Incentive Program. Legislation enacted in 2007 created the incentive program offering grants equal to 5% of total in-state spending to feature films, television programs, commercials and video games.

The rules will provide a clearer understanding of the program's scope and how an entity can participate in the program, and help the Commission administer the program.

No comments were received regarding adoption of the new rules. The Commission, however, has made a few changes to the rules that do not change the nature of the proposed rules. The changes included a more expanded definition of "applicant" and "Texas resident" in §121.2; clarifying what types of distribution feature films, television programs, and commercials need to qualify; modifying the wage cap calculations in §121.5 to be in a 12-month period; clarifying how Texas residency will be verified in §121.9; and rewriting §121.11(b)(1)(E) for more accuracy.

The new rules are adopted pursuant to the Texas Government Code §485.022 which directs the Commission to develop a procedure for the submission of grant applications and the awarding of grants, and Government Code, Chapter 2001, Subchapter B which prescribes the standards for rulemaking by state agencies.

*§121.2. Definitions.*
The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Applicant--The potential financial recipient of the grant either producing the project or the owner of the copyright. For commercials, this could be the production company, Ad Agency, or client. Only one application and applicant per project is allowed.

(2) Business day--A day other than Saturday, Sunday or a legal holiday.

(3) Cast--All people who appear or perform in front of the camera, including but not limited to, featured actors, extras, and interviewees.

(4) Department head--A manager or lead person who supervises and directs a department or group of one or more people, and who is ultimately responsible for the management of a particular division within a project.

(5) Eligible projects--Feature films, television programs, commercials, and video games that meet the qualifying requirements described in §121.3 of this chapter.

(6) Final expended budget--The total of in-state spending at the completion of the project that includes all receipts, invoices, pay orders, and any other documentation considered necessary for audit.

(7) Game console--An electronic device or machine used by consumers primarily for the purpose of playing video games, including, but not limited to, the Nintendo Wii, the Sony PlayStation 3, the Sony PlayStation 2 and the Microsoft Xbox360.

(8) Goods and services--Physical products and services directly attributable to the production of a project that include, but are not limited to, contractors, subcontractors and service providers, and product or equipment purchases, rentals and leases.

(9) Handheld console--A portable electronic device used by a consumer primarily for the purpose of playing video games, including, but not limited to, the Sony PlayStation Portable, the Nintendo DS, the Nintendo Game Boy Advanced and the Nintendo Game Boy Color.

(10) Ineligible projects--Projects that do not qualify for the grant, as stated in §121.4 of this chapter.

(11) In-state spending (Texas spend)--The amount of money spent in Texas by a production company during pre-production, production and postproduction of the project.

(12) Mobile electronic--A portable electronic device used by a consumer for the purpose of mobile computing and communication, including, but not limited to, personal digital assistants (PDAs) and mobile phones.

(13) Pass through company--A company or person that acts as an agent or broker for companies or persons outside of Texas to provide goods or services for the purpose of taking advantage of the Texas Moving Image Industry Incentive Program.

(14) Personal computer--An electronic device or machine used by a consumer for a variety of applications, including playing games. Games for this platform include those which play on the computer's CPU, as well as web and online game applications that are played using the personal computer.

(15) Physical production--The period encompassing preproduction, production, and postproduction.

(16) Postproduction expenditures--Expenditures that occur after the end of production, as defined in paragraph (19) of this section, including, but not limited to, editing, music, sound, and visual effects.

(17) Pre-production--The period where preparations are made for principal photography.

(18) Principal start date--

(A) For film, television, or commercial projects, this is the first day of principal photography.

(B) For video game and animated projects, this is the first day of production.

(19) Production--has different definitions for film, television, commercial, and video game projects.

(A) For film, television, or commercial projects, this is the period between the first and last days of principal photography, inclusive.

(B) For video game and animated projects, this is the period between the end of pre-production and the creation of the gold master.

(20) Production company--A film production company, television production company, video game developer, commercial production company, or film and television production company.

(21) Series of commercials--More than one commercial created in a contiguous production period and promoting the same product, service, or idea.

(22) Stand-alone arcade machine--An electronic device used by a business or consumer solely for bona fide amusement purposes that reward the player exclusively with non-cash merchandise prizes or a representation of value redeemable for those items, as outlined in Texas Penal Code, §47.01.

(23) Texas crew--An individual directly employed by the production company that is involved in the creation of this specific project.

(24) Texas resident--An individual who has resided in Texas for at least 120 days prior to the principal start date, unless enrolled as a full-time student at a Texas Institution of Higher Education, as defined by Texas Education Code §61.003.

(25) Underused area--Any area of Texas outside a 30-mile radius from Austin City Hall or Dallas City Hall.

*§121.3. Eligible Projects.*

(a) A project may be eligible for a grant under the Texas Moving Image Industry Incentive Program if it is a permitted project listed below that meets the minimum requirements.

(b) Feature Films.

(1) A feature film is defined as any:

(A) live-action or animated for-profit production, narrative or documentary;

(B) that is more than 30 minutes in length; and

(C) that is produced for distribution in theaters or via any digital format, including, but not limited to DVD, internet, or mobile electronic device.

(2) Minimum Requirements:

(A) Feature films must have minimum in-state spending of $1 million.

(B) 80% of the production days must be completed in Texas.

(C) 70% of the total number of paid crew must be Texas residents.

(D) 70% of the total number of paid cast, including extras, must be Texas residents.

(E) Animated feature films must have 70% of the combined total of paid crew and cast, including extras, be Texas residents.

(c) Television Programs.

(1) A television program is defined as any:

(A) live-action or animated for-profit production, narrative or documentary, including, but not limited to:

*(i)* an episodic series;

*(ii)* a miniseries;

*(iii)* a television movie ("MOW");

*(iv)* a television pilot; or

*(v)* a television episode;

(B) that is produced for distribution via broadcast, cable or any digital format, including, but not limited, to cable, satellite, internet, or mobile electronic device.

(2) Minimum Requirements:

(A) Television programs must have minimum in-state spending of $1 million per season.

(B) 80% of the production days must be completed in Texas.

(C) 70% of the total number of paid crew must be Texas residents.

(D) 70% of the total number of paid cast, including extras, must be Texas residents.

(E) Animated television programs must have 70% of the combined total of paid crew and cast, including extras, be Texas residents.

(d) Commercials.

(1) A commercial is defined as any:

(A) live-action or animated production;

(B) that is an individual commercial, series of commercials, music video, infomercial, or interstitial;

(C) that is less than 30 minutes in length;

(D) that is made for the purpose of promoting a product, service, or idea; and

(E) that is produced for distribution via broadcast, cable or any digital format including but not limited to cable, satellite, internet, or mobile electronic device.

(2) Minimum Requirements:

(A) Commercials must have minimum in-state spending of $100,000.

(B) 80% of the production days must be completed in Texas.

(C) 70% of the combined total of paid crew and cast, including extras, must be Texas residents.

(e) Video Games.

(1) A video game is defined as any:

(A) piece of software that provides a user or users with a game to play for the purpose of entertainment or education, such as for military or medical functions; and

(B) that is created for a game console, personal computer, handheld console, mobile electronic or stand-alone arcade machine.

(2) Minimum Requirements:

(A) Video games must have minimum in-state spending of $100,000.

(B) 80% of the production days must be completed in Texas.

(C) 70% of the combined total of paid crew and cast must be Texas residents.

*§121.5. Eligible and Ineligible In-State Spending.*

(a) The following are eligible expenditures:

(1) Wages and per diems paid to Texas residents, including additional compensation paid as part of a contractual or collective bargaining agreement.

(A) For the purpose of calculating the grant amount for feature films, video games, and commercials, only the first $50,000 in wages in a 12-month period to each Texas resident, and only the first $200,000 in wages in a 12-month period of each Texas resident working as a department head, will be included.

(B) For the purpose of calculating the grant amount for episodic television, only the first $100,000 in wages in a 12-month period to each Texas resident, and only the first $200,000 in wages in a 12-month period of each Texas resident working as a department head, will be included.

(2) Payments made to Texas companies for goods and services domiciled in Texas that are directly attributable to the physical production of the feature film, television program, commercial or video games. In the case of video games, the amount attributed to pre-production and research and development costs will be limited to an amount not to exceed 30% of the project's overall in-state spending.

(3) Payments for shipping on items shipped from or within Texas.

(4) Air travel to and from Texas on a Texas-based airline, including American Airlines, Continental Airlines and Southwest Airlines, or on a Texas-based air charter service.

(5) Rentals, leases and purchases of vehicles registered and licensed in the State of Texas.

(6) Music that is specifically created for the project and fees paid to Texas residents hired to create, orchestrate and perform the music.

(7) Legal fees directly attributable to the production.

(b) The following are ineligible expenditures:

(1) Payments made to non-Texas companies.

(2) Payments made for goods and services not domiciled in Texas.

(3) Payments made for goods and services that are not directly attributable to the physical production.

(4) Payments made by video game projects for pre-production costs that exceed 30% of the project's overall in-state spending.

(5) Expenses related to distribution, publicity, marketing, or promotion of the project.

(6) Rental, Lease or Mortgage payments, that includes, but is not limited to utilities and insurance, on facilities that are part of the permanent/continuous business operation.

(7) Wages and per diems paid to non-Texas residents.

(8) Payments made to pass-through companies.

(9) Fees for story rights, music rights or clearance rights.

(c) The Texas Film Commission reserves the right to determine which expenses are eligible or ineligible. These lists are not all inclusive.

*§121.9. Processing and Review of Applications.*

(a) All applications will be reviewed in the order they are received.

(b) Initial Review.

(1) Each application will go through an initial review process when the qualifying application has been received.

(A) If a project submits an application with required materials, and meets all qualifications, the applicant will receive an email notifying them that the Texas Film Commission has received their complete application and the review process will begin.

(B) If a project submits an application without the required materials, but initially appears to meet the minimum qualifications, the applicant will receive an email notifying them that their application requires additional materials or documentation, and that not receiving them in a timely manner may result in an application being disqualified.

(C) If a project submits an application with or without required materials and does not meet the minimum qualifications, the applicant will receive an email notifying them that they do not qualify for the incentive program, but may reapply before 5:00 p.m. Central Time on the last business day prior to the principal start date.

(2) After an email is sent to a qualifying applicant, the Texas Film Commission will contact the applicant to verify that all the information on the application is correct. Applicants will have the ability at that time to amend their application. The Texas Film Commission may determine whether an applicant's amendment(s) will require them to reapply or not.

(c) Preliminary Award Determination.

(1) During the preliminary award determination process, the Texas Film Commission will review the project's budget to identify eligible expenditures and to determine if the applicant meets the minimum in-state spending.

(2) Texas Film Commission will provide a summary to the Governor's Office of Budget and Planning for verification and determination of the grant agreement.

(3) The Texas Film Commission will also review project's content to determine if it is appropriate.

(d) Grant Agreement.

(1) Upon Texas Film Commission approval of the Qualifying Application and additional materials, a grant agreement will be executed between the Texas Film Commission and the applicant. The estimated grant amount will be based upon the applicant's estimated in-state spending, with a 10% contingency included in the encumbrement. The project's application summary will be attached to the grant agreement.

(2) The grant agreement must be returned to the Texas Film Commission within 7 business days with original signatures.

(e) Periodic Tracking and Review. Once the grant agreement has been executed by both parties, the Texas Film Commission and/or the Governor's Office of Budget and Planning may periodically review production activity including, but not limited to, in-state spending, shooting locations and number of Texas residents hired, and may require documentation for all of the above.

(f) Verifying Texas Residency. The applicant will be required to provide the Texas Film Commission with proof of each employee's residency status. The applicant can show proof by providing a copy of each employee's I-9 form if it has been verified with a current Texas driver license or identification certificate. If the I-9 form is verified with a document other than a Texas driver license or identification certificate, the applicant must provide a copy of the employee's I-9 and a copy of one of the following documents:

(1) Current Texas driver license or identification certificate.

(2) Current Texas voter registration card.

(3) Current student identification card from a Texas Academic Institution.

(4) A utility bill in the employee's name that verifies residency at a Texas address at least 120 days prior to the principal start date.

*§121.11. Confirmation and Verification of Texas Expenditures.*

(a) Film Commission will be responsible for collecting, authenticating and assembling incentive documentation from the productions for audit by the Governor's Financial Services Division.

(b) The following items must be received by the Texas Film Commission within 60 days of completing Texas expenditures:

(1) A final expended budget, in a format acceptable to the Office of the Governor, Financial Services Division, reflecting all in-state spending and including all receipts, invoices, pay orders, and any other documentation considered necessary by the Financial Services Division for audit.

(2) Feature films and television programs must submit a copy of the final script for review.

(3) Commercials and video games must submit final content for review.

(4) Additional documentation may be required including, but not limited to, the following:

(A) Financials, including all reports of expenditures

(B) Call sheets/Production reports

(C) Production Cost reports

(D) Video game production calendar

(E) Proof of employees' Texas residency

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200800982
Michael Bryant
Assistant General Counsel
Texas Film Commission
Effective date: March 10, 2008
Proposal publication date: January 18, 2008
For further information, please call: (512) 463-9200

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# TITLE 16. ECONOMIC REGULATION

## PART 9. TEXAS LOTTERY COMMISSION

## CHAPTER 402. CHARITABLE BINGO ADMINISTRATIVE RULES

## SUBCHAPTER G. COMPLIANCE AND ENFORCEMENT

### 16 TAC §402.709

The Texas Lottery Commission (Commission) adopts new Title 16, Part 9, Chapter 402, Subchapter G, §402.709 (relating to Corrective Action), with changes to the proposed text as published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 6964). Specifically the changes include: changing the title of the rule from "Corrective Action--Audit" to "Corrective Action"; adding the word "undisputed" to subsection (a)(1); removing the language "non-bingo" from subsection (b)(1); adding the language, "more frequent inspections and compliance audits and/or disciplinary action after notice and Commission action" to

subsection (c); adding the words "and/or" at subsection (c)(2); and deleting subsection (c)(4).

The purpose of the new rule is to set out the requirements for licensed authorized organizations to follow in order to address compliance issues identified in an audit of their organization. The new rule provides a process for organizations to take corrective actions for violations noted as a result of an audit of the organization's bingo activities. Specifically, the new rule sets forth the definition of "corrective action," lists examples of corrective actions, and explains what may occur if a licensed authorized organization does not take corrective action.

A public comment hearing was held on October 16, 2007. Several members of the public were present at the hearing. Representatives of the following groups or organizations commented against portions of the new rule: State VFW and several business organizations; Charities that are Bingo Conductors; Tejas Bingo; Palace Bingo; and All Saints Bingo Unit Trust. No written comments were received during the public comment period.

Comment: Subsection (a)(1): The draft rule suggests punitive action will occur even where an organization has a good faith/reasonable dispute with the Division.

Agency Response: The Commission agrees and has clarified subsection (a)(1) by adding the word "undisputed."

Comment: Under subsection (c), the words "notice of" should be inserted at the beginning of paragraphs (1) - (3) because, literally, the Bingo Division cannot issue a license revocation.

Agency Response: The Commission agrees and for clarification has added the language "more frequent inspections and compliance audits and/or disciplinary action after notice and Commission action" to subsection (c).

Comment: In subsection (c)(3), change "and" to "or" because the word "and" is very inclusive and sounds like all of the listed disciplinary actions will be taken without deviation.

Agency Response: The Commission agrees and has clarified subsection (c) by adding the words "and/or" at subsection (c)(2). The Commission has provided further clarification by adding the language "more frequent inspections and compliance audits and/or disciplinary action after notice and Commission action" to subsection (c), and deleting subsection (c)(4).

The new rule is adopted under Occupations Code §2001.054, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under Government Code §467.102, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

*§402.709. Corrective Action.*

(a) Definition of Corrective Action--Action(s) required by any of the following in order to resolve audit findings or violations of the Bingo Enabling Act or the Charitable Bingo Administrative Rules:

(1) an undisputed determination letter resulting from a compliance audit;

(2) an agreed order; or

(3) a decision in a contested case.

(b) Examples of corrective actions:

(1) Reimbursement of funds--Funds deposited into a bingo bank account to replenish the account for:

(A) non-permissible expenses; or

(B) bingo proceeds that were not deposited into the account.

(2) Removal of funds--Funds removed from a bingo bank account that are not proceeds from the conduct of bingo.

(3) Additional charitable distribution--Bingo funds disbursed from a bingo account to meet the minimum charitable distribution requirements.

(4) Implementation of internal controls--Controls a licensee or unit develops and implements to minimize or prevent theft or fraud related to its bingo operation.

(5) Implementation of policies and procedures--Written steps and processes a licensee or unit develops and implements to assist in the operation and control of the bingo operation.

(6) Payment of additional prize fees or rental taxes--The amount a licensee or unit must pay for any additional prize fee or rental tax due, including penalty and interest.

(c) If corrective action is not taken as required, the licensee may be subject to more frequent inspections and compliance audits and/or disciplinary action after notice and Commission action such as:

(1) license revocation;

(2) license suspension; and/or

(3) administrative penalty.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801072
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Effective date: March 13, 2008
Proposal publication date: October 5, 2007
For further information, please call: (512) 344-5012

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# TITLE 22. EXAMINING BOARDS

## PART 9. TEXAS MEDICAL BOARD

### CHAPTER 161. GENERAL PROVISIONS

**22 TAC §161.7**

The Texas Medical Board (Board) adopts amendments to §161.7, concerning Executive Director, without changes to the proposed text as published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9510) and will not be republished.

The amendments authorize the Executive Director to delegate responsibilities and authority to other staff members.

Prior to publishing the proposed amendments, the Board sought stakeholder input through Stakeholder Groups, which made comments on the suggested changes to the rules at a meeting

held on October 24, 2007. The comments were incorporated into the published proposed rules.

The Board received no public written comments and no one appeared to testify at the public hearing held on February 8, 2008.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which provide authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801100
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Effective date: March 16, 2008
Proposal publication date: December 21, 2007
For further information, please call: (512) 305-7016

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## CHAPTER 166. PHYSICIAN REGISTRATION

### 22 TAC §166.4

The Texas Medical Board (Board) adopts amendments to §166.4, concerning Expired Registration Permits, without changes to the proposed text as published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9511) and will not be republished.

The amendments interpret §156.005, Texas Occupations Code, as providing an exclusive penalty for practicing medicine after the expiration of a permit and within one year.

Prior to publishing the proposed amendments, the Board sought stakeholder input through Stakeholder Groups, which made comments on the suggested changes to the rules at a meeting held on October 24, 2007. The comments were incorporated into the published proposed rules.

The Board received no public written comments and no one appeared to testify at the public hearing held on February 8, 2008.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which provide authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Effective date: March 16, 2008
Proposal publication date: December 21, 2007
For further information, please call: (512) 305-7016

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## CHAPTER 167. REINSTATEMENT AND REISSUANCE

The Texas Medical Board (Board) adopts amendments to §§167.1, 167.3, and 167.8, and the repeal and replacement of §167.4, and §167.5, concerning Reinstatement and Reissuance, without changes to the proposed text as published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9512) and will not be republished.

The amendments to Chapter 167 amend the process for the application for the request for reissuance of a revoked license and add the requirement that a physician who wishes to have an active medical license after his license has been revoked or suspended must also demonstrate that his service would benefit the citizens of Texas.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously adopts the rule review of Chapter 167, Reinstatement and Reissuance.

Prior to publishing the proposed amendments, the Board sought stakeholder input through Stakeholder Groups, which made comments on the suggested changes to the rules at a meeting held on October 24, 2007. The comments were incorporated into the published proposed rules.

The Board received no public written comments and no one appeared to testify at the public hearing held on February 8, 2008.

### 22 TAC §§167.1, 167.3, 167.8

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which provide authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
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For further information, please call: (512) 305-7016

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### 22 TAC §167.4, §167.5

The repeals are adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which provide authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
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Proposal publication date: December 21, 2007
For further information, please call: (512) 305-7016

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**22 TAC §167.4, §167.5**

The new sections are adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which provide authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Donald W. Patrick, MD, JD
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Texas Medical Board
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For further information, please call: (512) 305-7016

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## CHAPTER 175. FEES, PENALTIES AND FORMS

**22 TAC §175.1**

The Texas Medical Board (Board) adopts amendments to §175.1, concerning Application Fees, without changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5956) and will not be republished.

The adopted amendment increases fees in accordance with contingency revenue riders and the requirement to produce additional revenue for implementation of S.B. 29, S.B. 1731, and salary increases in H.B. 1.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously adopts the rule review of Chapter 175, Fees, Penalties and Forms.

Prior to publishing the proposed amendments, the Board sought stakeholder input through Stakeholder Groups, which made comments on the suggested changes to the rules at a meeting held on October 24, 2007. The comments were incorporated into the published proposed rules.

The Board received no public written comments; and no one appeared to testify at the public hearing held on February 8, 2008.

The amendment is adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which provide authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Effective date: March 16, 2008
Proposal publication date: September 7, 2007
For further information, please call: (512) 305-7016

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## CHAPTER 177. CERTIFICATION OF NON-PROFIT HEALTH ORGANIZATIONS

**22 TAC §§177.1, 177.3, 177.4, 177.6, 177.9, 177.13**

The Texas Medical Board (Board) adopts amendments to §§177.1, 177.3, 177.4, 177.6, 177.9, and 177.13, concerning Certification of Non-Profit Health Organizations, without changes to the proposed text as published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9514) and will not be republished.

The adopted amendments update the name of the Texas Medical Board, amends statutory references to the Business Organizations Code, corrects citations to other provisions in the Board's rules, and updates the Form for complaint notification.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously adopts the rule review of Chapter 177, Certification of Non-Profit Health Organizations.

Prior to publishing the proposed amendments, the Board sought stakeholder input through Stakeholder Groups, which made comments on the suggested changes to the rules at a meeting held on October 24, 2007. The comments were incorporated into the published proposed rules.

The Board received no public written comments; and no one appeared to testify at the public hearing held on February 8, 2008.

The amendments are adopted under the authority of the Texas Occupations Code Annotated, §153.001 and §154.006, which

provide authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Effective date: March 16, 2008
Proposal publication date: December 21, 2007
For further information, please call: (512) 305-7016

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## CHAPTER 187. PROCEDURAL RULES
## SUBCHAPTER H. IMPOSITION OF ADMINISTRATIVE PENALTY

**22 TAC §§187.75 - 187.82**

The Texas Medical Board (Board or TMB) adopts new rules to be included in a new Subchapter H, Chapter 187, to include §§187.75 (Purposes and Construction); 187.76 (Notice of Intention to Impose Administrative Penalty; Response); 187.77 (Payment of the Administrative Penalty); 187.78 (Written Response); 187.79 (Personal Appearance at an Informal Meeting); 187.80 (Imposition of Administrative Penalty); 187.81 (Reports of Imposition of Administrative Penalty); and 187.82 (Unpaid Administrative Penalties). New §§187.75 - 187.81 are adopted with changes to the proposed text as published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9517) and will be republished. Section 187.82 is adopted without changes and will not be republished.

The new rules provide that the board may impose an administrative penalty, in accordance with the provision of §165.001, et seq., Occ. Code, and set forth the procedure for notification of intention to impose administrative penalty, for opportunity to provide a written response or request a personal appearance at an informal meeting, for notice of the right to judicial review of the imposition of the administrative penalty, for reports to the National Practitioner Data Bank and in Board newsletters, and for required payment of administrative penalties before a licensee's registration may be renewed.

The Board received comments regarding the proposed new rules from Austin Heart and the Texas Medical Association (TMA).

Comment No. 1. Both Austin Heart and TMA commented that the 14-day notice of intention to impose an administrative penalty, as originally proposed, should be increased to 30 days.

Response: The Board notes that only 10-days notice is required for a contested case hearing under the Administrative Procedure Act, §2001.051(1), Gov't Code. The 14-day notice, as provided in the proposed rules as originally published, exceeded this requirement. However, in an effort to provide even more notice and opportunity to respond, the Board has revised §187.79 to allow 30 days from the date the Board sends notice of intention to impose administrative penalty for the licensee to request a personal appearance at an informal meeting. Furthermore, under the revision, the Board cannot take action to impose an administrative penalty until the next regular meeting after 30 days after the notice is sent. Thus, a written response will be accepted and considered up until that next regular meeting, which may be as much as 90 days after the notice is sent. The Board believes that this revision will satisfy the concerns expressed by this comment.

Comment No. 2. The TMA commented that the rules should set forth the detail of the notice of intention to impose administrative penalty, which should be specific and unambiguous.

Response: The Board has responded to this comment by revising §187.76 to include a new subsection (b), which provides that the notice shall include, at a minimum, information regarding the allegations, based on information then available, to allow the licensee to prepare a response; deadlines for a response and the consequences of failing to meet such deadlines; the consequences of paying a proposed administrative penalty, including the fact that payment will constitute a public record; the licensee's right to submit a written response or request a personal appearance; a description of the procedural process for consideration of a written response or request for personal appearance; and the name and contact information for an employee who can provide further information. The Board provided a draft of this revision to the Commenter before adoption; and the Commenter responded that: "TMA supports provision of a detailed notice as outlined in the regulation." The Board believes that this revision satisfies the concerns expressed by this comment.

Comment No. 3. The TMA commented that it strongly supports a provision stating that a prompt response to an allegation will provide an opportunity that an investigation will not be opened.

Response: The Board has responded to this comment by revising §187.76 by adding a new subsection (d). It was the intent of the originally published proposed rule to provide this opportunity through the 14-day required response time. By extending the response time to 30 days, the Board intends to clarify its intent that no investigation should be opened if an adequate response is received in time for the Board to dismiss the complaint under the provisions of §157.057(b), Occ. Code. The Board believes that this revision will satisfy the concerns expressed by this comment.

Comment No. 4. The TMA commented that a prompt response within 30 days after the complaint has been received by the Board depends largely upon the rapid action of TMB staff in forwarding the allegation to the licensee. The Commenter urged the Board to place in the regulation a time frame within which TMB staff must forward the notice.

Response: The Board disagrees with this comment. The Board intends that the notice shall be sent as soon as practicable after the complaint is received, affording the licensee with at least 14 days to file a written response that can be a basis for determining that a complaint should not be filed and no investigation should be opened. This was the basis for the 14-day deadline provided in the proposed rule as originally published. The Board believes that the current practice for notice of a complaint allows for a prompt response. Notice of intention to impose an administrative penalty should be sent at least as quickly as notices are now being sent, so such a provision is not necessary. Moreover, such a requirement could interfere with the simplicity and efficiency of the process of imposing an administrative penalty. Therefore,

the Board has not made any revisions to the rule as originally published that would implement this comment.

Comment No. 5. The TMA commented that it strongly supports the ability of a physician to request an informal meeting before a member of the TMB or its District Review Committee to contest allegations, as contained in the proposed regulation.

Response: The Board has responded to this comment by retaining the right of a licensee to request an informal meeting in the revision to §187.79 of the new rules.

Comment No. 6. The TMA commented that the notice of intention to impose administrative penalty be sent by certified mail, return receipt requested, to validate the timeframe applicable to a particular physician.

Response: Response to Comment No. 2. The Board disagrees with this comment. The cost of sending notices of complaints and disciplinary action by certified mail, return receipt requested, would be substantial. The fiscal impact to the Board cannot be assumed in light of current appropriations for operations of the agency. Furthermore, certified mail, return receipt requested, does not guarantee delivery and would provide an opportunity for licensees to avoid notice simply by failing to accept the certified mail. For these reasons, the Board does not believe that any changes should be made to the rules as published. The Board has adopted the revisions to the new rules with no change regarding this comment.

Comment No. 7. The TMA commented that the calculation of the licensee's response to the Board's notice should be conditioned upon the postmark of the document and not the receipt of the response by the TMB.

Response: The Board disagrees with this comment. The purpose of these new rules is to provide for a simple, efficient, and expedited procedure for handling complaints of administrative violations of the Medical Practice Act. The Board has accepted the comment to extend the notice period from 14 days to 30 days. Calculating the response time based on the postmark, rather than the date received by the Board, would further extend the time for handling these administrative violations and would interfere with the simplicity of the procedure, the efficiencies gained from the procedure, and an expeditious resolution of the complaint. For these reasons, the Board does not believe that any changes should be made to the rules as published. The Board has adopted the revisions to the new rules with no change regarding this comment.

Comment No. 8. The TMA commented that TMB should have the discretion to waive the deadlines for a response for good cause.

Response: The Board disagrees with this comment. Such discretion would insert an element of subjectivity into a procedure that is designed to be simple, efficient, and expeditious. A requirement to make a discretionary decision would interfere with the efficiencies necessary for this procedure to benefit the licensees and the agency. By extending the deadline from 14 days to 30 days, as requested by the Commenter (far exceeding the 10-day requirement of the Administrative Procedure Act), the Board believes that a reasonable response time has been allowed. Furthermore, a written response will be considered at any time before the Board takes action to impose an administrative penalty. Since the revised rule provides that the Board cannot take action to impose an administrative penalty until the next regular meeting of the board after the expiration of 30 days after the notice of intention to impose administrative penalty is sent to the licensee, a written response in many cases will be received by the Board and considered weeks or months after the 30-day deadline. While the deadline for requesting a personal appearance will be a strict deadline, the facts that the Board has extended the time from 14 days to 30 days and that the licensee may still submit a written response, are considered to be a reasonable accommodation of the concerns raised by this comment.

Comment No. 9. The TMA commented that the proposed rules, as originally published, could be interpreted to allow for the imposition of an administrative penalty for violations that are designated aggravated administrative violations in 22 TAC §190.14.

Response: The Board has responded to this comment by revising §187.75 to specifically exclude aggravated administrative violations. This comment stated what the Board intended originally, and the revision clarifies that intent. The Board believes that this revision will satisfy the concerns expressed by this comment.

Comment No. 10. The TMA commented that §187.77, as originally published, would violate §164.0025, Occ. Code.

Response: The Board has responded to this comment by revising §187.77, to require that any payment of an administrative violation must be presented to the Board at the next regular meeting for approval. This was an unintentional drafting error, and the Board appreciates the Commenter's constructive criticism. The Board believes that this revision will satisfy the concerns expressed by this comment.

Comment No. 11. The TMA commented that the regulation should clarify whether "board representatives" means board members or board staff.

Response: The Board notes that the reference to "board representatives," as originally published, referred to §164.004(a)(2), Occ. Code, which has consistently been applied by the Board to mean members of the Board or the District Review Committee. Furthermore, the proposed §187.79(b), as originally published, provided that an informal meeting would be held under the procedures set forth in 22 TAC §187.17, which provides that one Board representative must be a "public member," and one Board representative must be a "physician member." The proposed rule, as originally published, further provided that the requirement for two or more Board representatives does not apply and that "there may be one or more board representatives at the informal meeting, who may be either a physician or public member of the Board." The Board has revised this provision to include members of the District Review Committee. Therefore, the Board believes that, as revised, the proposed rule is clear that any Board representative must be a member of the Board or a member of the District Review Committee. The Board believes that the revision will satisfy the concerns expressed by this comment.

Comment No. 12. The TMA commented that it strongly supports the notion that the newsletter and press release will not contain the names of physicians subject to the penalties outlined by this regulation. They stated that such publication is an unnecessary additional punishment on the licensee.

Response: The Board has responded to this comment by retaining the provision in §187.81 in the revision to the new rules.

Comment No. 13. The TMA commented that the regulation should contain an express statement that information and proposed action are confidential.

Response: The Board has responded to this comment by revising §187.81 to include a new subsection (c), which specifically states that the complaint, Notice of Intention to Impose An Administrative Penalty, a written response or request for personal appearance by the licensee, any information provided to any and report of a panel or board representatives of the DPRC, shall remain confidential. The Board believes that this revision will satisfy the concerns expressed by this comment.

No one appeared to testify at the public hearing held on February 8, 2008.

The new rules are adopted under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Texas Medical Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure. The new rules are further adopted under the authority of §165.002, which provides that the Board by rule shall prescribe the procedure by which the Board may impose an administrative penalty.

*§187.75. Purposes and Construction.*

The purpose of this subchapter is to set forth a procedure for the imposition of an administrative penalty as provided in Chapter 165, Subchapter A (§165.001, et seq.) of the Act, for violations identified in §190.14 of this title (relating to Disciplinary Sanction Guidelines) as administrative violations, but not including aggravated administrative violations.

*§187.76. Notice of Intention to Impose Administrative Penalty; Response.*

(a) Before an administrative penalty is imposed, the board will provide a licensee who is alleged to have committed an administrative violation with a notice of the allegations regarding an administrative violation and the amount of a proposed administrative penalty.

(b) The Notice shall include, at a minimum:

(1) information regarding the allegations, based on information then available, to allow the licensee to prepare a response;

(2) deadlines for a response and the consequences of failing to meet such deadlines;

(3) the consequences of paying a proposed administrative penalty, including the fact that payment will constitute a public record;

(4) the licensee's right to submit a written response or request a personal appearance;

(5) a description of the procedural process for consideration of a written response or request for a personal appearance;

(6) the name and contact information for an employee who can provide further information.

(c) The licensee may respond to the notice as follows:

(1) The licensee may pay the proposed administrative penalty;

(2) The licensee may provide a written response to the board; or

(3) The licensee may request a personal appearance at an informal meeting.

(d) If the licensee submits a written response within 30 days after the complaint is received by the board, board staff may determine that the complaint should not be filed and no investigation opened. Because the board is limited to 30 days for the preliminary investigation, pursuant to §157.057(b), Occupations Code, no extensions may be granted to this deadline.

*§187.77. Payment of the Administrative Penalty.*

If the licensee pays the administrative penalty, the payment shall be acknowledged on a copy of the notice, which shall constitute an agreed imposition of the administrative penalty. A report of the payments upon notice of intention to impose administrative penalties shall be made to the board at the next regular meeting for approval.

*§187.78. Written Response.*

If, at any time prior to the imposition of an administrative penalty, the licensee submits a written response without a request for a personal appearance at an informal meeting, the allegations and the written response shall be submitted to the Disciplinary Process Review Committee of the board ("DPRC") at the next regular meeting. The action of the DPRC shall be submitted to the Board for approval.

*§187.79. Personal Appearance at an Informal Meeting.*

(a) If, within 30 days after the Notice of Intention to Impose Administrative Penalty is sent to the licensee, the licensee submits a request for personal appearance at an informal meeting, an informal meeting shall be scheduled in accordance with §164.004(a)(2) of the Act before one or more board representatives.

(b) An informal meeting under this Subchapter may consider only dismissal of the matter or the imposition of an administrative penalty. The board representatives may not consider revocation, suspension, or any other sanction. The provisions of §187.18 of this title (relating to Informal Show Compliance Proceeding and Settlement Conference Based on Personal Appearance) shall apply to the informal meeting, except that there may be one or more board representatives at the informal meeting, who may be either a physician or public member of the Board or District Review Committee.

(c) The recommendation of the board representative(s) to impose the administrative penalty or to dismiss the allegations shall be referred to the DPRC at the next regular meeting. The action of the DPRC shall be submitted to the Board for approval.

*§187.80. Imposition of Administrative Penalty.*

(a) The board may enter an order imposing an administrative penalty in accordance with §165.004 of the Act at the next regular meeting of the board after the expiration of 30 days after Notice of Intention to Impose Administrative Penalty is sent to the licensee if:

(1) the licensee has failed to respond to the notice; or

(2) the DPRC has approved the imposition of an administrative penalty.

(b) Upon imposition of an administrative penalty, the board shall notify the licensee of the board's order. The notice shall include a statement of the right of the licensee to judicial review of the order, in accordance with §165.005 of the Act.

(c) If the licensee pursues judicial review of the order, the administrative record shall include the Notice of Intention to Impose Administrative Penalty, any written response provided by the licensee, any documents reviewed by board representatives at an informal meeting, the recommendation of the board representative(s), any documents considered by the DPRC, the minutes of the DPRC, the minutes of the

board imposing an administrative penalty, and the order imposing an administrative penalty.

(d) An administrative penalty imposed by the board shall be due and payable to the board within 60 days after the licensee receives notice of the board's order.

*§187.81. Reports of Imposition of Administrative Penalty.*

(a) An imposition of an administrative penalty shall be a public record.

(b) The imposition of an administrative penalty shall not be considered a restriction or limitation on the license of the licensee and shall not be reported to the National Practitioner Data Bank. The board's newsletter and any press release shall include only the number of administrative penalties imposed.

(c) The complaint, Notice of Intention to Impose an Administrative Penalty, a written response or request for personal appearance by the licensee, any information provided to and any report of a panel of board representatives or the DPRC, shall remain confidential, in accordance with §164.007(c), Occupations Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 25, 2008.

TRD-200801107
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Effective date: March 16, 2008
Proposal publication date: December 21, 2007
For further information, please call: (512) 305-7016

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# TITLE 25. HEALTH SERVICES

## PART 1. DEPARTMENT OF STATE HEALTH SERVICES

### CHAPTER 460. MISCELLANEOUS

The Executive Commissioner of the Health and Human Services Commission (commission) on behalf of the Department of State Health Services (department) adopts the repeal of 25 Texas Administrative Code (TAC), Chapter 460, Miscellaneous, in its entirety. Specifically, the commission on behalf of the department adopts the repeal of §§460.11 - 460.29, 460.31 - 460.35, 460.37, 460.38, 460.40, 460.45, 460.51 - 460.67, 460.101, 460.102, and 460.103 - 460.105, concerning miscellaneous rules from the legacy agencies that were consolidated into the department by Acts 2003, 78th Legislature, Regular Session, Chapter 198 (House Bill 2292). The repeals are adopted without changes to the proposal as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9250), and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The repeals are necessary to eliminate duplication and to recognize the effect of House Bill 2292 on department rules. When the department's legacy agencies Texas Department of Health (TDH), the mental health division of the Texas Department of Mental Health and Mental Retardation (TDMHMR), the Texas Commission on Alcohol and Drug Abuse (TCADA), and the Texas Health Care Information Council (THCIC) were consolidated into the department, 25 TAC, Part 1, was designated as the location for all department rules. Chapter 460 was designated for rules from the department's legacy agencies that did not need to be retained. The rules in Chapter 460 concern legacy agency powers and duties that transferred to the commission through House Bill 2292, were duplicative of the law establishing the department or other law applicable to the department, or were expected to be established by department policy rather than by rule. The rules in Chapter 460 were transferred there in 2004 with the intent of eventual repeal.

SECTION-BY-SECTION SUMMARY

The rules in Chapter 460, Subchapter A, Divisions 2 - 4 are legacy TDMHMR rules. Repeal of Division 2, §§460.11 - 460.29, Fraud and Abuse and Recovery of Benefits, is necessary because powers and duties concerning Medicaid fraud and abuse investigation and recovery were transferred from the legacy agencies to the commission, Office of Inspector General (OIG), on September 1, 2004, pursuant to House Bill 2292. Some of the sections in Division 2 are internal policies and procedures that do not need to be in rules. The sections concerning grounds for sanctions against providers, grounds for further referrals for administrative or judicial action, and the recovery of overpayments are set out in the contracts with providers and in the OIG rules. The OIG rules, which were adopted effective January 9, 2005, are located in 1 TAC, Part 15, Chapter 371.

Repeal of Division 3, §§460.31 - 460.35, 460.37, 460.38, 460.40, and 460.45, Interagency Agreements, is necessary because those legacy TDMHMR rules are duplicative of department rules or policies. The sections in Division 3 all were transferred effective September 1, 2004, from TAC, Title 25, Chapter 411 to Chapter 460. Section 460.31, Purpose, §460.32, Application, and §460.33, Definitions, are unnecessary because they refer to the legacy agency TDMHMR, which no longer exists. Section 460.34, concerning Provision, Regulation, and Funding of Services in Hospitals and Long-Term Care Facilities, is duplicative because a rule adopting this memorandum of understanding (MOU) is already found at 25 TAC, §111.2. State law requires the MOU to be adopted by rule. Section 460.35, concerning Coordination of Services to Disabled Persons, is duplicative because a rule adopting this MOU is already found at 25 TAC, §1.121. State law requires the MOU to be adopted by rule. Section 460.37, concerning Coordination of Delivery of Mental Health and Mental Retardation Services to Hearing-Impaired or Deaf Persons, is duplicative because a rule adopting this MOU is already found at 25 TAC, §37.193. State law does not require the MOU to be adopted by rule. Section 460.38, concerning Coordination of Exchange and Distribution of Public Awareness Information, is duplicative because a rule adopting this MOU is already found at 25 TAC, §1.101. State law requires the MOU to be adopted by rule. Section 460.40, concerning Training Requirements for Identifying Abuse, Neglect, and Unprofessional or Unethical Conduct in Health Care Facilities is duplicative because department rules adopting this MOU or incorporating its requirements are already found at 25 TAC, §133.47, §134.46, §411.490, §411.641, and §448.603. Section 460.45, Distribution, is duplicative because the distribution requirements for the MOUs are found in internal department policies.

Repeal of Division 4, §§460.51 - 460.67, Internal Audits and Investigations, is necessary because the department's internal and external audit powers and duties reside in policy rather than in rule. The Texas Internal Auditing Act, found in Texas Government Code, Chapter 2102, does not require agencies to adopt rules for internal auditing practices.

Repeal of the rules in Chapter 460, Subchapter B, §460.101 and §460.102, Procurement, and Subchapter C, §§460.103 - 460.105, Miscellaneous Provisions, is necessary because the sections in both subchapters are legacy TCADA rules concerning powers and duties which either were transferred to the commission in House Bill 2292, exist elsewhere in state law or department or commission rules, reside in department policy rather than in rule, or refer to legacy agency TCADA. Section 460.101, Procurement, and §460.102, Procurement Protests, are redundant because they are part of the requirements placed on health and human services agencies by state law at Texas Government Code, §2155.144, Procurements by Health and Human Services Agencies; commission procurement rules found in 1 TAC, Chapter 391; state law and Texas Building and Procurement Commission rules concerning historically underutilized businesses (HUB); and current department rules concerning HUBs at 25 TAC, §1.171. Sections 460.103 - 460.105 are rules specific to TCADA, which no longer exists.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

## SUBCHAPTER A. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

## DIVISION 2. FRAUD AND ABUSE AND RECOVERY OF BENEFITS

**25 TAC §§460.11 - 460.29**

STATUTORY AUTHORITY

The repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801077
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: March 13, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 458-7111 x6972

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## DIVISION 3. INTERAGENCY AGREEMENTS

**25 TAC §§460.31 - 460.35, 460.37, 460.38, 460.40, 460.45**

STATUTORY AUTHORITY

The repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801078
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: March 13, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 458-7111 x6972

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## DIVISION 4. INTERNAL AUDITS AND INVESTIGATIONS

**25 TAC §§460.51 - 460.67**

STATUTORY AUTHORITY

The repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801079

Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: March 13, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 458-7111 x6972

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## SUBCHAPTER B. PROCUREMENT

**25 TAC §460.101, §460.102**

STATUTORY AUTHORITY

The repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801080
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: March 13, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 458-7111 x6972

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## SUBCHAPTER C. MISCELLANEOUS PROVISIONS

**25 TAC §§460.103 - 460.105**

STATUTORY AUTHORITY

The repeals are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 22, 2008.

TRD-200801081
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: March 13, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 458-7111 x6972

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# TITLE 28. INSURANCE

# PART 1. TEXAS DEPARTMENT OF INSURANCE

## CHAPTER 26. SMALL EMPLOYER HEALTH INSURANCE REGULATIONS

## SUBCHAPTER D. HEALTH GROUP COOPERATIVES

**28 TAC §26.402, §26.404**

The Commissioner of Insurance adopts amendments to §26.402 and §26.404, concerning the establishment of, and provision of health benefit plan coverage to, health group cooperatives pursuant to the Insurance Code Chapter 1501. The amendments are adopted without changes to the proposal published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9253).

REASONED JUSTIFICATION. The adopted amendments are necessary to implement SB 1255, 80th Legislature, Regular Session, which revised the standards by which carriers provide group health benefit plan coverage to health group cooperatives comprised of small employers, large employers, or both small and large employers. SB 1255 amended §1501.0581 to provide that a health group cooperative may be composed of small employers, large employers, or both small and large employers. It further amended §1501.0581 by adding subsection (a-1) to provide that health group cooperative membership may be restricted to small and large employers within a single industry grouping as defined by the most recent edition of the United States Census Bureau's North American Industry Classification System. SB 1255 also amended §1501.063 to provide that a health group cooperative composed only of small employers and that has not made the election described by §1501.0581(o)(1) in accordance with subsection (p) of that section, or a health group cooperative that is composed of both small and large employers, may be treated in the same manner as a large employer for purposes of the Insurance Code Chapter 1501.

HOW THE SECTIONS WILL FUNCTION. The adopted amendments to §26.402 make changes to provisions addressing authorized membership of a health group cooperative and amend subsections (a) and (c) to conform the subsections to the Insurance Code §1501.0581(a) - (c) as amended by SB 1255. The adopted amendments to §26.402 add new subsection (e), which provides that a health group cooperative may restrict its membership to small and large employers within a single industry grouping as defined by the most recent edition of the United States Census Bureau's North American Industry Classification System, and re-designates subsequent subsections accordingly.

The adopted amendment to §26.404 provides that a health group cooperative composed only of small employers and that has not made the election to limit participation in the cooperative to 50 eligible employees as described by §1501.0581(o)(1) and in ac-

cordance with subsection (p) of that section, or a health group cooperative that is composed of both small and large employers, may be treated in the same manner as a large employer for purposes of the Insurance Code Chapter 1501.

SUMMARY OF COMMENTS. The Department did not receive any comments on the published proposal.

STATUTORY AUTHORITY. The amendments are adopted under the Insurance Code §§1501.010, 1501.058, and 36.001. Section 1501.010 authorizes the Commissioner of Insurance to adopt rules as necessary to implement Chapter 1501. Section 1501.058 requires compliance with federal laws applicable to cooperatives and health benefit plans issued through cooperatives, to the extent required by state law or rules adopted by the Commissioner. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 15, 2008.

TRD-200800980
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: March 6, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 463-6327

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# TITLE 34. PUBLIC FINANCE

## PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

### CHAPTER 9. PROPERTY TAX ADMINISTRATION

### SUBCHAPTER C. APPRAISAL DISTRICT ADMINISTRATION

**34 TAC §9.402**

The Comptroller of Public Accounts adopts an amendment to §9.402, concerning special use application forms, with changes to the proposed text as published in the January 4, 2008, issue of the *Texas Register* (33 TexReg 66).

Tax Code, §23.54, requires the comptroller to prescribe exemption application forms. There are non-substantive changes to adoption by reference forms 50-166, 50-167, 50-168, and 50-169 to remove unnecessary information.

The rule is being amended to adopt by reference amended application forms for 1-d-1 Appraisal Application (1-d-1 Agricultural Land) and the 1-d Appraisal Application (1-d Agricultural Land). An amendment to the 1-d-1 appraisal application is proposed to implement a provision of House Bill 604, 80th Legislature, 2007, effective January 1, 2008, which allows land used for wildlife management and under a federal permit to protect endangered species to qualify for 1-d-1 appraisal without a five-year agricultural appraisal history. An amendment to the 1-d appraisal application form is proposed to implement House Bill 3630, 80th Legislature, 2007, effective January 1, 2008, which provides that land subject to an equity loan may not qualify for 1-d agricultural appraisal. Subsection (b) is amended to delete reference to the telephone numbers for Telecommunication Device for the Deaf (TDD).

No comments were received regarding adoption of the amendment.

The amendment is adopted under Tax Code, §23.54, which requires that the comptroller prescribe application forms for 1-d-1 agricultural appraisal, and Tax Code, §23.43, which requires the comptroller to prescribe the application form for 1-d agricultural appraisal.

The amendment implements Tax Code, §23.54, House Bill 604 and House Bill 3630, adopted in 2007 by the 80th Legislature.

*§9.402. Special Use Application Forms.*

(a) In applying for special use valuation under Tax Code, Chapter 23, the applicant shall use a form provided by the appraisal office. The appraisal office shall use the model form adopted by the Comptroller of Public Accounts which is appropriate to the special use type, or use a form containing information which is in substantial compliance with the model form adopted by the comptroller.

(b) The model application forms listed in paragraphs (1) - (7) of this subsection are adopted by the Comptroller of Public Accounts by reference. Copies of these forms are available for inspection at the office of the Texas Register or can be obtained from the Comptroller of Public Accounts, Property Tax Division, P.O. Box 13528, Austin, Texas 78711-3528. Copies may also be requested by calling our toll-free number 1-800-252-9121. In Austin, call (512) 305-9999.

(1) 1-d Appraisal Application (1-d Agricultural Land) (Form 50-165);

(2) 1-d-1 Appraisal Application (1-d-1 Agricultural Land) (Form 50-129);

(3) open-space land application (1-d-1 timberland) (Form 50-167);

(4) 1-d-1 Ecological Laboratory Appraisal Application (Form 50-166);

(5) application for recreational, park, and scenic land (Form 50-168);

(6) application for public access airport property (Form 50-169); and

(7) application for restricted-use timberland appraisal (Form 50-281).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200800998

Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: March 10, 2008
Proposal publication date: January 4, 2008
For further information, please call: (512) 475-0387

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**34 TAC §9.419**

The Comptroller of Public Accounts adopts an amendment to §9.419, concerning procedures for determining property tax exemption for motor vehicles leased for personal use, without changes to the proposed text as published in the January 4, 2008, issue of the *Texas Register* (33 TexReg 66).

This rule adopts by reference three forms, including a form for the rendition of leased motor vehicles. Tax Code, §22.24, requires taxpayers to render on a form prescribed or approved by the comptroller. Subsection (c) is amended to delete reference to the telephone numbers for Telecommunication Device for the Deaf (TDD).

Effective September 1, 2007, House Bill 264, adopted by the 80th Legislature, 2007, permits property owners to affirm if the information in the property owner's most recently filed rendition continues to be accurate. The bill requires each rendition form prescribed by the comptroller to provide a box that the property owner may check to affirm that the information in the most recently filed rendition continues to be accurate.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Tax Code, §22.24, which requires the comptroller to prescribe rendition forms. The amendment is also adopted under Tax Code, §11.43, which requires the comptroller to prescribe the contents of the application form for each kind of exemption.

The amendment implements Tax Code, §22.24.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200800996
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: March 10, 2008
Proposal publication date: January 4, 2008
For further information, please call: (512) 475-0387

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## SUBCHAPTER D. APPRAISAL REVIEW BOARD

**34 TAC §9.801**

The Comptroller of Public Accounts adopts amendments to §9.801, concerning notice of protest, without changes to the proposed text as published in the January 4, 2008, issue of the *Texas Register* (33 TexReg 68).

The amendments update the model notice of protest, which is adopted by reference. House Bill 538, 80th Legislature, 2007, effective January 1, 2008, provided property owners with a right to postponement of a protest hearing under certain circumstances. The proposed amendment to the form will add the new right to the form for the notice of protest.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Tax Code, §41.44, which requires the comptroller to adopt a notice of protest.

The amendment implements §41.44, which sets forth the contents of the notice of protest and House Bill 538, 80th Legislature, 2007.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200801001
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: March 10, 2008
Proposal publication date: January 4, 2008
For further information, please call: (512) 463-4601

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## SUBCHAPTER H. TAX RECORD REQUIREMENTS

**34 TAC §9.3031**

The Comptroller of Public Accounts adopts an amendment to §9.3031, concerning rendition forms, with changes to the proposed text as published in the January 4, 2008, issue of the *Texas Register* (33 TexReg 69).

Tax Code, §22.24, requires taxpayers to render on a form prescribed or approved by the comptroller. There are non-substantive changes to adoption by reference forms 50-143, 50-153, 50-154, and 50-155 to remove unnecessary information.

Effective September 1, 2007, House Bill 264, adopted in 2007 by the 80th Legislature, permits property owners to affirm if the information in the property owner's most recently filed rendition continues to be accurate. The bill requires that each rendition form prescribed by the comptroller to provide a box that the property owner may check to affirm that the information in the most recently filed rendition continues to be accurate. Subsection (d) is amended to delete reference to the telephone numbers for Telecommunication Device for the Deaf (TDD).

No comments were received regarding adoption of the amendment.

The amendment is adopted under Tax Code, §22.24 which requires that the comptroller to prescribe rendition forms, and House Bill 264.

The amendment implements Tax Code, §22.24 and House Bill 264.

*§9.3031. Rendition Forms.*

(a) All appraisal offices and all tax offices appraising property for purposes of ad valorem taxation shall prepare and make available at no charge, printed or electronic forms for the rendering of property.

(b) A person rendering property shall use the model form adopted by the Comptroller of Public Accounts or a form containing information which is in substantial compliance with the model form if approved by the comptroller.

(c) Nothing in this section shall be construed to prohibit the combination of the information contained on two or more model forms into a single form in order to use a single form to achieve substantial compliance with two or more model forms.

(d) The model rendition forms for various categories of property in paragraphs (1) - (17) of this subsection are adopted, as amended, by the comptroller by reference. Copies of these forms are available for inspection at the offices of the Texas Register or may be obtained from the Comptroller of Public Accounts, P.O. Box 13528, Austin, Texas 78711. Copies may also be requested by calling toll-free 1-800-252-9121. In Austin, call (512) 305-9999. The model rendition forms are:

(1) General Real Estate Rendition of Taxable Property (Form 50-141);

(2) General Personal Property Rendition of Taxable Property-Non Incoming Producing (Form 50-142);

(3) Report of Leased Space for Storage of Personal Property (Form 50-148);

(4) Industrial Real Property Rendition of Taxable Property (Form 50-149);

(5) Oil and Gas Lease Rendition of Taxable Property (Form 50-150);

(6) Mine and Quarry Real Property Rendition of Taxable Property (Form 50-151);

(7) Telephone Company Rendition of Taxable Property (Form 50-152);

(8) REA-Financed Telephone Company Rendition of Taxable Property (Form 50-153);

(9) Electric Company and Electric Cooperative Rendition of Taxable Property (Form 50-154);

(10) Gas Distribution Utility Rendition of Taxable Property (Form 50-155);

(11) Railroad Rendition of Taxable Property (Form 50-156);

(12) Pipeline and Right-of-Way Rendition of Taxable Property (Form 50-157);

(13) Business Personal Property Rendition of Taxable Property (Form 50-144);

(14) Watercraft Rendition of Taxable Property (Form 50-158);

(15) Aircraft Rendition of Taxable Property (Form 50-159);

(16) Mobile Homes Rendition of Taxable Property (Form 50-160); and

(17) Residential Real Property Inventory (Form 50-143).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 19, 2008.

TRD-200800997
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: March 10, 2008
Proposal publication date: January 4, 2008
For further information, please call: (512) 475-0387

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# TITLE 37. PUBLIC SAFETY AND CORRECTIONS

## PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

### CHAPTER 1. ORGANIZATION AND ADMINISTRATION
### SUBCHAPTER C. PERSONNEL AND EMPLOYMENT POLICIES

**37 TAC §1.42**

The Texas Department of Public Safety (Department) adopts new §1.42, concerning Veteran's Preference Grievance Procedure, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9283).

Adoption of new §1.42 is necessary due to the passage of H.B. 1275, Acts 2007, 80th Leg., R.S., codified in Chapter 657, Government Code, §657.010. This new law allows for an individual entitled to a veteran's employment preference and who is aggrieved by a decision of a public entity to appeal the decision to the governing body. New §1.42 provides a procedure by which the Department can adequately address the grievant's concerns within the time limits imposed by the statute.

No comments were received regarding adoption of the new section.

The new section is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Government Code, §657.010.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801031

Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 11, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 424-2135

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## SUBCHAPTER R. ACCOUNTING PROCEDURES

### 37 TAC §1.231

The Texas Department of Public Safety (Department) adopts the repeal of §1.231, concerning Protest/Dispute Resolution/Hearings, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9284).

Adoption of the repeal is necessary due to substantial changes being made and is being filed simultaneously with the adoption of a new §1.231 which is necessary in order to comply with §2155.076 of the Government Code regarding consistent rules and document retention.

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work, and Texas Government Code, §2155.076.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801032
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 11, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 424-2135

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### 37 TAC §1.231

The Texas Department of Public Safety adopts new §1.231, concerning Procedures For Vendor Protests Of Procurements, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9284).

Adoption of new §1.231 is necessary in order to promulgate policy to comply with §2155.076 of the Government Code regarding consistent rules and document retention. The adoption of new §1.231 is being filed simultaneously with the adoption for repeal of current §1.231.

No comments were received regarding adoption of the new section.

The new section is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §2155.076.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801033
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 11, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 424-2135

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# CHAPTER 5. CRIMINAL LAW ENFORCEMENT

## SUBCHAPTER A. INVESTIGATION

### 37 TAC §5.1, §5.2

The Texas Department of Public Safety adopts the repeal of §5.1 and §5.2, concerning Investigation, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9285).

Adoption of the repeal of §5.1 and §5.2 is necessary in order to simultaneously adopt a new §5.1 and §5.2 which will promulgate department policy regarding criminal investigations.

No comments were received regarding adoption of the repeal.

The repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.0096.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801035
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 11, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 424-2135

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## SUBCHAPTER A. GENERAL PROVISIONS

### 37 TAC §5.1, §5.2

The Texas Department of Public Safety adopts new §5.1 and §5.2, concerning General Provisions, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9286).

Adoption of new §5.1 and §5.2 is necessary in order to promulgate department policy regarding criminal investigations. In addition, the title of the subchapter has been changed. The new sections are filed simultaneously with the adoption for repeal of current §5.1 and §5.2.

No comments were received regarding adoption of the new sections.

The new sections are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.0096.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801034
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 11, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 424-2135

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## SUBCHAPTER B. REPORTING PROPERTY CRIMES AGAINST THE ELDERLY

**37 TAC §§5.11 - 5.16**

The Texas Department of Public Safety adopts amendments to §§5.11 - 5.16, concerning Reporting Property Crimes Against The Elderly, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9287).

Adoption of amendments to the sections is necessary in order to update the unit responsible for maintaining records, to update the definitions section, and to make other nonsubstantive changes necessary in order for the sections to read better.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.051(c), which provides that the director of the department shall adopt rules, subject to commission approval, to prescribe the form, manner and regular intervals at which a law enforcement agency reports to the department an investigation of certain property crimes committed against the elderly.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801036
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 11, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 424-2135

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## SUBCHAPTER C. THREATS AGAINST PEACE OFFICER

**37 TAC §§5.31 - 5.34, 5.36, 5.38**

The Texas Department of Public Safety adopts amendments to §§5.31 - 5.34, 5.36, and 5.38, concerning Threats Against Peace Officer, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9289).

Adoption of amendments to the sections is necessary in order to update the definitions section, and to make other nonsubstantive changes necessary in order for the sections to read better.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Government Code, §411.048 (e) and (i), which provide that the director of the department shall adopt rules, subject to commission approval, to prescribe the form and manner to be used by a criminal justice agency reporting to the department its determination of a serious threat against a peace officer, to prescribe how an agency may use information disseminated to it by the department, and to require compliance with general federal intelligence guidelines.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 11, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 424-2135

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## SUBCHAPTER D. MULTICOUNTY DRUG TASK FORCES

**37 TAC §§5.51 - 5.71**

The Texas Department of Public Safety adopts an amendment to §5.51, and new §§5.52 - 5.71, concerning Multicounty Drug Task Forces, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9291).

Adoption of amendments to §5.51 is necessary in order to update the definitions section. Adoption of new §§5.52 - 5.70 is necessary in order to promulgate policy regarding the coordination of drug law enforcement efforts. This adoption is filed simultaneously with an adoption for repeal of current §§5.52 - 5.70.

No comments were received regarding adoption of the amendment or the new sections.

The amendment and new sections are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.0097, which requires the department to establish policies and procedures for multicounty drug task forces, provides the authority to ensure compliance, and the authority to evaluate each multicounty drug force with respect to whether the task force complies with state and federal requirements including policies and procedures established by the department and demonstrates effective performance outcomes; and Texas Local Government Code, §362.004, which provides that the department confirm the strategic need for the task force and the composition of the task force and that the force comply with the policies and procedures established for the operation of the multicounty drug task force.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801039
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 11, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 424-2135

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**37 TAC §§5.52 - 5.70**

The Texas Department of Public Safety adopts the repeal of §§5.52 - 5.70, concerning Multicounty Drug Task Forces, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9294).

Adoption of repeal of the sections is necessary due to the addition of a new §5.52 and the renumbering of the remaining sections. Adoption of the repeals is filed simultaneously with an adoption for new renumbered sections.

No comments were received regarding adoption of the repeal.

The repeals are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; Texas Government Code, §411.0097, which requires the department to establish policies and procedures for multicounty drug task forces, provides the authority to ensure compliance, and the authority to evaluate each multicounty drug force with respect to whether the task force complies with state and federal requirements including policies and procedures established by the department and demonstrates effective performance outcomes; and Texas Local Government Code, §362.004, which provides that the department confirm the strategic need for the task force and the composition of the task force and that the force comply with the policies and procedures established for the operation of the multicounty drug task force.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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## CHAPTER 13. CONTROLLED SUBSTANCES
## SUBCHAPTER A. GENERAL PROVISIONS

**37 TAC §13.1**

The Texas Department of Public Safety adopts amendments to Chapter 13, Subchapter A, §13.1, concerning Chapter Definitions, with changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8706) and will be republished.

Paragraph (9) is changed due to a clerical error. The term "Emergency medical services medical director" is changed to "Emergency medical service medical director."

Adoption of the amendments to §13.1 reformat the section and are necessary in order to add definitions for advanced practice nurse, emergency medical service, emergency medical service medical director, emergency medical service provider, and first responder.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act; and Texas S.B. 1879, Acts 2007, 80th Legislature, Regular Session.

*§13.1. Chapter Definitions.*
The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Controlled Substances Act (Texas Health and Safety Code, Chapter 481).

(2) Administer, abuse unit, adulterant or dilutant, agent, controlled premises, controlled substance, controlled substance analogue, deliver, delivery, designated agent, director, dispense, distribute, distributor, drug, drug paraphernalia, Federal Drug Enforcement Administration, hospital, institutional practitioner, lawful possession, manufacture, marihuana, medication order, narcotic drug, official prescription form, opiate, patient, person, pharmacist, pharmacist-in-charge, pharmacy, possession, practitioner, prescribe, prescription, principal place of business, and registrant--Have the meanings assigned those terms by the Act, §481.002.

(3) Advanced practice nurse or APN--an individual recognized as a licensed advances practice nurse by the Texas Board of Nurse Examiners.

(4) CSR--Controlled Substances Registration.

(5) Day--means a calendar day unless the context clearly indicates another meaning such as a business day.

(6) Department or DPS--The Texas Department of Public Safety.

(7) Drug Enforcement Administration or DEA--The Federal Drug Enforcement Administration.

(8) Emergency medical service or EMS--A person comprised of all needed emergency equipment and trained personnel to administer proper pre-hospital care in a medical or health situation, and licensed as such by the Texas Department of State Health Services.

(9) Emergency medical service medical director or EMSMD--A person recognized as such under Texas Administrative Code, Title 22, Part 9, §197.2 and who has a current DPS registration.

(10) Emergency medical service provider or EMSP--A person licensed as such by the Texas Department of State Health Services.

(11) First responder organization or FRO--An organization certified as such by the Texas Department of State Health Services.

(12) Individual practitioner--A physician, dentist, veterinarian, optometrist, podiatrist, or other individual licensed, registered, or otherwise permitted to dispense a controlled substance in the course of professional practice, but does not include a pharmacist, a pharmacy, or an institutional practitioner.

(13) Inhalant paraphernalia--An item or other material defined as such by Texas Health and Safety Code, §485.001.

(14) Institutional practitioner--A hospital or other person (other than an individual) licensed, registered, or otherwise permitted to dispense a controlled substance in the course of professional practice, but does not include a pharmacy.

(15) Laboratory apparatus--An item subject to Subchapter E of this chapter (relating to Precursors and Apparatus).

(16) Licensed vocational nurse or LVN--An individual recognized as a licensed vocational nurse by the Texas Board of Vocational Nurse Examiners.

(17) Long-term care facility or LTCF--An establishment licensed as such by the Texas Department of Aging and Disability Services.

(18) Mid-level practitioner--An individual practitioner, other than a physician, dentist, veterinarian, optometrist, or podiatrist, who is licensed, registered, or otherwise permitted to dispense a controlled substance in the course of professional practice. Examples of mid-level practitioners include, but are not limited to, health care providers such as advanced nurse practitioners and physician assistants who are authorized to dispense controlled substances.

(19) Narcotic controlled substance--A narcotic drug or other controlled substance that contains opium or an opiate derivative.

(20) Non-narcotic controlled substance--A controlled substance that does not contain opium or an opiate derivative.

(21) PCLAS--The Precursor Chemical/Laboratory Apparatus Section.

(22) Physician assistant--An individual licensed as such by the Texas State Board of Physician Assistant Examiners.

(23) Precursor chemical--A substance subject to Subchapter E of this chapter (relating to Precursors and Apparatus).

(24) Readily retrievable record--A record created and maintained by an automatic data processing or mechanized record keeping system so that a particular type of record can be separated from all other records in a reasonable time. The term includes a record created and maintained by annotation of each material item with an asterisk, redline, or some other manner visually identifiable apart from all other items appearing on the required record.

(25) Record--A notification, order form, statement, invoice, prescription, inventory information, or other document for the acquisition or disposal of a controlled substance, precursor, or apparatus in any manner by a registrant or permit holder under a record keeping or inventory requirement of federal law, the Act, or this chapter.

(26) Registered nurse--An individual recognized as such by the Texas Board of Nurse Examiners.

(27) Schedule II--A list of narcotic and non-narcotic controlled substances found in the most current version of Schedule II as established or altered by the commissioner of health under the Act, Subchapter B, and published in the *Texas Register*.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2008.

TRD-200801047
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 12, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 424-2135

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## SUBCHAPTER B. REGISTRATION

**37 TAC §§13.21, 13.25, 13.27**

The Texas Department of Public Safety adopts amendments to Chapter 13, Subchapter B, §13.21 and §13.27 without changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8708). Section 13.25 is adopted with changes and will be republished.

The change to §13.25(c) corrects a grammatical error.

Adoption of amendments to the sections is necessary in order to add emergency medical service provider to the list of groups that must register under §13.21; to add NAR-77b to the list of forms required for application under §13.25; and to add new late renewal application fee information under §13.27.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act, and Tex. S.B. 1879, Acts 2007, 80th Leg., R.S.

*§13.25. Application.*

(a) Required. A person required to register under this subchapter must comply with this subchapter and Subchapter F of this chapter (relating to Applications).

(b) Form. An applicant must make:

(1) a new or original application on DPS Form NAR-77, NAR-77a, or NAR 77b; and

(2) a renewal application on DPS Form NAR-78 or NAR-78a.

(c) Rejection. An applicant who seeks to renew a registration may correct a rejected or defective application and resubmit it for filing at any time before termination under §13.30 of this title (relating to Termination).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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Proposal publication date: November 30, 2007
For further information, please call: (512) 424-2135

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## SUBCHAPTER D. OFFICIAL PRESCRIPTIONS

### 37 TAC §13.75

The Texas Department of Public Safety (DPS or Department) adopts amendments to Chapter 13, Subchapter D, §13.75, without changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8710). The DPS also withdraws proposed amendments to §§13.71, 13.73, 13.76, 13.79, 13.84, and 13.85 as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8709).

Adoption of amendments to §13.75 is necessary in order to add additional requirements for pharmacy responsibility within the official Texas prescription program.

The Department accepted comment on the proposed rules through December 31, 2007. Written comments were submitted by Mary Staples, Regional Director, State Government Affairs, and Michelle Cope, Manager, Legislative and Regulatory Affairs, in a combined letter on behalf of the National Association of Chain Drug Stores; Gay Dodson, R.Ph., Executive Director/Secretary, Texas State Board of Pharmacy (TSBP); and, Aaron K. Calodney, M.D., President of the Texas Pain Society.

The substantive comments, as well as the Department's responses thereto, are summarized below:

COMMENT: Regarding §13.75 as proposed, the Department would establish that any prescription for a Schedule II controlled substance "presented for filling later than 21 days after issuance" would be void. The provision is in direct conflict with federal regulations recently published by the Drug Enforcement Administration (DEA) under 21 CFR §1306.12 and §1306.14. In light of the federal regulation, it is urged that the Department delete the proposed 21-day restriction from the rule.

RESPONSE: 21 CFR §1306.12(b)(1) provides that an individual practitioner may issue multiple prescriptions authorizing the patient to receive a total of up to a 90-day supply of a Schedule II controlled substance provided the following conditions are met:... (iv) The issuance of multiple prescriptions as described in this section is permissible under the applicable state laws; and (v) The individual practitioner complies fully with all other applicable requirements under the Act and these regulations as well as any additional requirements under state law. Texas Health and Safety Code, §481.074(d), was amended from requiring a Schedule II prescription to be filled within 7 days of its issuance to allowing the Department, after consulting with the TSBP and the Texas Medical Board (TMB), to set the requirement by rule. Section 13.75 provides for the filling of a Schedule II prescription within 21 days of its issuance. The TSBP agrees with §13.75 as published. The Department disagrees with the withdrawal of §13.75 at this time, and the rule is recommended as published. However, the Department is willing to consider changes to §13.75 in the future provided that appropriate safeguards can be established to minimize the threat of diversion.

COMMENT: Regarding §13.75, the TSBP agreed with the proposed changes in §13.75. The TSBP stated that proposed §13.76 requiring a pharmacy to submit certain information to the Department regarding prescriptions for Schedules II - V should be delayed until the Advisory Committee created by Senate Bill 1879 has been established. In addition, the TSBP suggested that the proposed language in §13.207 as it relates to a 24-hour production of retrievable records match the federal DEA requirement of 48 hours and that "readily retrievable" is not defined in this chapter and the rules do not define a timeframe to produce records that are not readily retrievable.

RESPONSE: The Department agrees with the TSBP regarding §13.75, and the rule is recommended as published. The Department agrees to withdraw the amendments proposed to §13.76 and §13.207.

COMMENT: Regarding §13.75, the Texas Pain Society concurs with the language contained in 21 CFR §1306.12 and §1306.14 and strongly recommends that the DPS not limit in any way the implementation of the federal rule.

RESPONSE: 21 CFR §1306.12(b)(1) provides that an individual practitioner may issue multiple prescriptions authorizing the patient to receive a total of up to a 90-day supply of a Schedule II controlled substance provided the following conditions are met:... (iv) The issuance of multiple prescriptions as described in this section is permissible under the applicable state laws; and (v) The individual practitioner complies fully with all other applicable requirements under the Act and these regulations as well as any additional requirements under state law. Texas Health and Safety Code, §481.074(d) was amended from requiring a Schedule II prescription to be filled within 7 days of its issuance to allowing the Department, after consulting with the TSBP and the TMB, to set the requirement by rule. Section 13.75 provides for the filling of a Schedule II prescription within 21 days of its issuance. The Department disagrees with the withdrawal of §13.75 at this time and recommends that §13.75 be adopted as published. However, the Department is willing to consider changes to §13.75 in the future provided that appropriate safeguards can be established to minimize the threat of diversion.

The Department conducted a public hearing on January 24, 2008 regarding the proposed rule changes after receiving a request for public hearing from the Texas Pharmacy Association, Texas Federation of Drug Stores, and the Texas Society

of Health-Systems Pharmacists. The substantive comments, as well as the Department's responses thereto are summarized below:

COMMENT: Regarding §§13.71, 13.73, 13.75, 13.76, 13.79, 13.84, 13.85, and 13.207, Kristie Zamrazil, representing the Texas Pharmacy Association, suggested that the proposed rules listed should be withdrawn until the Advisory Committee set out in Senate Bill 1879, §7, meets. In addition, Ms. Zamrazil stated that the TSBP and TMB should provide input on the design of the database system. The system should provide "real time" use of data so pharmacists could exercise professional judgment before the filling of prescriptions. The time for registrants to produce records should be expanded to 72 hours, rather than 24 as stated in §13.207.

RESPONSE: The Department agrees to withdraw amendments to §13.71, 13.73, 13.76, 13.79, 13.84, 13.85, and 13.207. The Department disagrees with the withdrawal of §13.75. Section 13.75 provides for the extension of time from 7 days to 21 days that a Schedule II prescription can be filled after its date of issuance. The Department recommends §13.75 be adopted as published. However, the Department is willing to consider changes to §13.75 in the future provided that appropriate safeguards can be established to minimize the threat of diversion.

COMMENT: Regarding §§13.71, 13.73, 13.75, 13.76, 13.79, 13.84, 13.85, and 13.207, Brad Shields, representing the Texas Society of Health System Pharmacists agreed with Ms. Zamrazil's testimony and restated that the proposed rules should be withdrawn until after the Advisory Committee created by Senate Bill 1879, §7, is in place to advise the Department.

RESPONSE: The Department will withdraw amendments to §§13.71, 13.73, 13.76, 13.79, 13.84, 13.85, and 13.207. The Department does not agree with the withdrawal of §13.75. Section 13.75 is recommended to be adopted a published.

COMMENT: Regarding §13.75, Krista Crockett, Executive Director for the Texas Pain Society, read a written statement in support of the new DEA rule for Schedule II controlled substances (21 CFR §1306.12 and §1306.14) and strongly recommended that the Department not limit in any way the implementation of the federal rule.

RESPONSE: 21 CFR §1306.12(b)(1) provides that an individual practitioner may issue multiple prescriptions authorizing the patient to receive a total of up to a 90-day supply of a Schedule II controlled substance provided the following conditions are met:... (iv) The issuance of multiple prescriptions as described in this section is permissible under the applicable state laws; and (v) The individual practitioner complies fully with all other applicable requirements under the Act and these regulations as well as any additional requirements under state law. Texas Health and Safety Code, § 481.074(d), was amended from requiring a Schedule II prescription to be filled within 7 days of its issuance to allowing the Department, after consulting with the TSBP and the TMB, to set the requirement by rule. Section 13.75 provides for the filling of a Schedule II prescription within 21 days of its issuance. The Department disagrees with the withdrawal of §13.75 at this time and recommends that §13.75 be adopted as published. However, the Department is willing to consider changes to §13.75 in the future provided that appropriate safeguards can be established to minimize the threat of diversion.

COMMENT: Karen Reagan, representing the Texas Federation of Drug Stores, supported the statements made by representatives of the Texas Pharmacy Association, Texas Society of Health System Pharmacies, and the Texas Pain Society regarding §§13.71, 13.73, 13.75, 13.76, 13.79, 13.84, 13.85, and 13.207.

RESPONSE: The Department agrees to withdraw §13.71, 13.73, 13.76, 13.79, 13.84, 13.85, and 13.207. The Department disagrees with the withdrawal of §13.75. Section 13.75 provides for the extension of time from 7 days to 21 days that a Schedule II prescription can be filled after its date of issue. The Department recommends §13.75 be adopted as published. However, the Department is willing to consider changes to §13.75 in the future provided that appropriate safeguards can be established to minimize the threat of diversion.

The amendments are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act; Texas Health and Safety Code, §481.074(d), which authorizes the director, by rule and in consultation with the TMB and the TSBP, to establish the period after the date on which the prescription is issued that a person may fill a prescription for a controlled substance listed in Schedule II; and Tex. S.B. 1879, Acts 2007, 80th Leg., R.S.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2008.

TRD-200801049
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 12, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 424-2135

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## SUBCHAPTER F. APPLICATION

### 37 TAC §13.132

The Texas Department of Public Safety adopts amendments to Chapter 13, Subchapter F, §13.132, concerning Application Requirements, without changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8711).

Adoption of amendments to the section are necessary in order to change language regarding when a pharmacist-in-charge must sign the registration application for an applicant and adds new subsection (h) to state signature requirements for EMSP applicants.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act, and Tex. S.B. 1879, Acts 2007, 80th Leg., R.S.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2008.

TRD-200801050
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 12, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 424-2135

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## SUBCHAPTER N. ADMINISTRATIVE PENALTIES AND HEARINGS

### 37 TAC §§13.301 - 13.305

The Texas Department of Public Safety adopts new Chapter 13, Subchapter N, §§13.301 - 13.305, concerning Administrative Penalties and Hearings, without changes to the proposed text as published in the November 30, 2007, issue of the *Texas Register* (32 TexReg 8713).

Adoption of the new sections is necessary in order to add information and requirements for administrative penalties and hearings regarding administrative penalties.

No comments were received regarding adoption of the new sections.

The new sections are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act; and Texas Senate Bill 1879, Acts 2007, 80th Legislature, Regular Session.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 21, 2008.

TRD-200801051
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 12, 2008
Proposal publication date: November 30, 2007
For further information, please call: (512) 424-2135

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# CHAPTER 15. DRIVER LICENSE RULES

## SUBCHAPTER J. DRIVER RESPONSIBILITY PROGRAM

### 37 TAC §15.162

The Texas Department of Public Safety adopts amendments to §15.162, concerning Installment Agreements, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9295).

Adoption of the amendments to §15.162 are necessary because effective September 1, 2007, Texas Transportation Code, Chapter 708, §708.153 amended the Driver Responsibility law to allow the department the ability to reinstate installment payments for a person who has previously defaulted on the installment plan.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §708.002.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801040
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 11, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 424-2135

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### 37 TAC §15.163

The Texas Department of Public Safety adopts new §15.163, concerning Amnesty, Incentive and Indigency Programs, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9296).

Adoption of new §15.163 is necessary because effective September 1, 2007, Texas Transportation Code, Chapter 708, §708.157 amended the Driver Responsibility law to allow the department the ability to establish amnesty, incentive and indigency programs. The new section promulgates policy regarding the Amnesty, Incentive and Indigency Program.

No comments were received regarding adoption of the new section.

The new section is adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, §708.157.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801041
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 11, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 424-2135

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## CHAPTER 17. ADMINISTRATIVE LICENSE REVOCATION

## SUBCHAPTER A. ADMINISTRATIVE LICENSE REVOCATION

**37 TAC §§17.2 - 17.4, 17.6, 17.9, 17.11, 17.12, 17.16**

The Texas Department of Public Safety (Department) adopts amendments to §§17.2 - 17.4, 17.6, 17.9, 17.11, 17.12, and 17.16, concerning Administrative License Revocation, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9297).

Adoption of the amendments to the sections is necessary in order to more accurately reflect current policies and procedures due to statutory requirements.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Transportation Code, §524.002 and §724.003, which provide that the Department may adopt rules to administer those chapters.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801042
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 11, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 424-2135

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## CHAPTER 23. VEHICLE INSPECTION

## SUBCHAPTER I. VEHICLE INSPECTION ADVISORY COMMITTEE

**37 TAC §§23.201 - 23.206, 23.208, 23.210, 23.213**

The Texas Department of Public Safety adopts amendments to §§23.201 - 23.206, 23.208, 23.210, and 23.213, concerning the Vehicle Inspection Advisory Committee, without changes to the proposed text as published in the December 14, 2007, issue of the *Texas Register* (32 TexReg 9299).

Adoption of the amendments to the sections is necessary in order to reflect changes to Texas Transportation Code, §548.006 made by H.B. 2565 (80th Texas Legislature, Regular Session), which established an Advisory Committee to advise the department on administrative rules, make recommendations, and perform other advisory functions as requested, relating to the operation of the vehicle emissions testing program under Transportation Code, Chapter 548, Subchapter F.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work; and Texas Transportation Code, Chapter 548.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 20, 2008.

TRD-200801043
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: March 11, 2008
Proposal publication date: December 14, 2007
For further information, please call: (512) 424-2135

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# REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

## Proposed Rule Reviews

### Office of Consumer Credit Commissioner

**Title 7, Part 5**

The Finance Commission of Texas (commission) files this notice of intention to review and consider for readoption, revision, or repeal, Texas Administrative Code, Title 7, Part 5, Chapter 82, concerning Administration. Chapter 82 contains §82.1, concerning Custody of Criminal History Record Information, and §82.2, concerning Public Information Requests; Charges.

This rule review will be conducted pursuant to Texas Government Code, §2001.039. The commission will accept comments for 31 days following publication of this notice in the *Texas Register* as to whether the reasons for adopting these rules continue to exist. Final consideration of the rules being reviewed under this notice is scheduled for the commission's meeting on June 20, 2008.

The Office of Consumer Credit Commissioner, which administers these rules, believes that the reasons for adopting the rules contained in this chapter continue to exist. Any questions or written comments pertaining to this notice of intention to review should be directed to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, or by e-mail to laurie.hobbs@occc.state.tx.us. Any proposed changes to the rules as a result of the review will be published in the Proposed Rules Section of the *Texas Register* and will be open for an additional 31-day public comment period prior to final adoption or repeal by the commission.

TRD-200801168
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 27, 2008

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### Texas Board of Occupational Therapy Examiners

**Title 40, Part 12**

The Texas Board of Occupational Therapy Examiners files this notice of intention to review Chapters 361 - 364 and 367 - 376. This review is in accordance with the requirements of the Texas Government Code, §2001.039. The agency's reason for adopting the rules contained in these chapters continues to exist. Written comments on the review of these chapters may be directed to Augusta Gelfand, OT Coordinator, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701. Faxed comments may be sent to (512) 305-6970.

TRD-200801082
John Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Filed: February 22, 2008

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### Executive Council of Physical Therapy and Occupational Therapy Examiners

**Title 22, Part 28**

The Executive Council of Physical Therapy and Occupational Therapy Examiners files this notice of intention to review Chapter 651. This review is in accordance with the requirements of the Texas Government Code, §2001.039.

The agency's reason for adopting the rules contained in this chapter continues to exist.

Written comments on the review of rules in Chapter 651 may be directed to Jennifer Jones, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701. Faxed comments may be sent to (512) 305-6951.

TRD-200801146
John Maline
Executive Director
Executive Council of Physical Therapy and Occupational Therapy Examiners
Filed: February 26, 2008

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### State Securities Board

**Title 7, Part 7**

The State Securities Board (Agency), beginning March 2008, will review and consider for readoption, revision, or repeal Chapter 133, Forms, in accordance with Texas Government Code, §2001.039. The rules to be reviewed are located in Title 7, Part 7, of the Texas Administrative Code.

The assessment made by the Agency at this time indicates that the reasons for readopting this chapter continue to exist.

The Agency's Board will consider, among other things, whether the reasons for adoption of these rules continue to exist and whether amendments are needed. Any changes to the rules proposed by the Agency's Board after reviewing the rules and considering the comments received in response to this notice will appear in the "Proposed Rules" section of the *Texas Register* and will be adopted in accordance

with the requirements of the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001. The comment period will last for 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this notice of intention to review may be submitted in writing, within 30 days following the publication of this notice in the *Texas Register*, to David Weaver, General Counsel, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to Mr. Weaver at (512) 305-8310. Comments will be reviewed and discussed in a future Board meeting.

TRD-200801061
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Filed: February 21, 2008

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## Adopted Rule Reviews

Texas Medical Board

**Title 22, Part 9**

The Texas Medical Board adopts the review of Chapter 167, §§167.1 - 167.8, concerning Reinstatement and Reissuance, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously adopts amendments to §§167.1, 167.3 and 167.8; and the repeal and replacement of §167.4 and §167.5.

The proposed review was published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9735).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 167, Reinstatement and Reissuance.

TRD-200801108
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: February 25, 2008

♦ ♦ ♦

The Texas Medical Board adopts the review of Chapter 170, §§170.1 - 170.3, concerning Pain Management, pursuant to the Texas Government Code, §2001.039.

The proposed review was published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9735).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 170, Pain Management.

TRD-200801109
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: February 25, 2008

♦ ♦ ♦

The Texas Medical Board adopts the review of Chapter 175, §§175.1 - 175.5, concerning Fees, Penalties and Forms, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously adopts amendments to §175.1.

The proposed review was published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6161).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 175, Fees, Penalties and Forms.

TRD-200801110
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: February 25, 2008

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The Texas Medical Board adopts the review of Chapter 177, §§177.1 - 177.13, concerning Certification of Non-Profit Health Organizations, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register*, the Texas Medical Board contemporaneously adopts amendments to §§177.1, 177.3, 177.4, 177.6, 177.9, and 177.13.

The proposed review was published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9735).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in this chapter continues to exist.

This concludes the review of Chapter 177, Certification of Non-Profit Health Organizations.

TRD-200801111
Donald W. Patrick, MD, JD
Executive Director
Texas Medical Board
Filed: February 25, 2008

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# TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 19 TAC §103.1101(b)(1)

TEXAS EDUCATION AGENCY
Automated External Defibrillator (AED) Reimbursement
Authorized by HB 1, Article IX, Section 19.86; General Appropriations Act, 80th Texas Legislature

**Reimbursement Applicant and Contact Information**

Name of School District or Open-Enrollment Charter School: _____

County District Number (6 digits): _____

Mailing Address: _____

Primary Contact Person: _____

Telephone #: _____ E-Mail: _____

Secondary Contact Person: _____

Telephone #: _____ E-Mail: _____

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**Number of Campuses**

1. How many campuses* does the school district or open-enrollment charter school operate?
   _____

   *For the purposes of the Commissioner's rules for AED reimbursement, "campus" is not necessarily defined as those entities are defined for PEIMS. A "campus" is defined as a single physical facility with a unique physical address.

**Campuses with an AED purchased prior to June 1, 2007**

2. Of the number of campuses indicated in question 1, identify each with an AED purchased prior to June 1, 2007. In the grid below, list the campus name and physical address. The campuses listed will not be eligible for reimbursement.

Attach additional pages as needed to list all campuses identified.

| Campus Name | Physical Address |
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TEXAS EDUCATION AGENCY
Automated External Defibrillator (AED) Reimbursement
Authorized by HB 1, Article IX, Section 19.86; General Appropriations Act, 80th Texas Legislature

**Campuses with an AED purchased between June 1, 2007, and June 30, 2008, to comply with the Senate Bill 7 requirement to make available at each campus in the district at least one AED**

3. Of the number of campuses indicated in question 1, identify each with an AED purchased between June 1, 2007, and June 30, 2008, purchased to comply with the aforementioned Senate Bill 7 requirement. In the grid below, list the campus name, physical address, and the eligible reimbursement amount*.

   *The eligible reimbursement amount per AED is the actual cost of AED or $1,475, whichever is less. A copy of the invoice must also be attached to this AED Reimbursement Form as supporting documentation of the purchase.

Attach additional pages as needed to list all campuses identified eligible for reimbursement.

| Campus Name | Physical Address | Eligible Reimbursement Amount cost of AED or $1,475*, whichever is less |
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| | **Reimbursement Total** | |

**Certification**

I hereby certify that the information contained in this form is correct.

| First and Last Name | Title | Signature |
|---|---|---|
| | | |
| **Phone Number** | **Fax Number** | **Date Signed** |
| ( ) | ( ) | |

Return one signed copy with original signature (with attached invoices) by mail or hand delivery to:
Texas Education Agency
Division of Formula Funding, Room 6-112
1701 North Congress Avenue
Austin, TX 78701-1494

These materials must be received by TEA no later than 5:00 p.m. central time, June 30, 2008.

# IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

## Department of Aging and Disability Services

Notice of Public Hearing

The Department of Aging and Disability Services (DADS) is preparing the agency's External/Internal Assessment for inclusion in the Texas Health and Human Services (HHS) System Strategic Plan for Fiscal Year (FY) 2009-2013. The Department will hold a public hearing on Tuesday, March 18, 2008, at 4:00 p.m. to receive comments regarding the trends and challenges to consider when preparing this strategic planning document. The location of the public hearing will be in the Winters Building Public Hearing Room at 701 W. 51st Street, Austin, Travis County, Texas 78751. The previous DADS External/Internal Assessment, Chapter VI, in the HHS System Strategic Plan for FY 2007-2011 is available through the below website link or by request in hard copy:

**Download address at:** http://www.hhs.state.tx.us/StrategicPlans/HHS07-1/HHS_StPlan.shtml

**Request hard copy from:** LaCrecia Stevens, DADS, P.O. Box 149030, M.C. W235, Austin, Texas 78714; (512) 438-5634; or lacrecia.stevens@dads.state.tx.us

At least 72 hours prior to the DADS public hearing, please contact LaCrecia Stevens at (512) 438-5634, TDD (512) 424-3250, or lacrecia.stevens@dads.state.tx.us to request an interpreter for individuals who are deaf or hearing impaired.

Individuals who are unable to attend the public hearing may submit their comments in writing to DADS by 5:00 p.m. on March 19, 2008, to Wendy Francik at wendy.francik@dads.state.tx.us or through this DADS website link: http://www.dads.state.tx.us/strategicplanning. In addition, please check the following HHS System website for information about public hearings that the Health and Human Services Commission will hold across the state from April - May 2008: http://www.hhs.state.tx.us/index.shtml.

TRD-200801148
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Filed: February 26, 2008

♦ ♦ ♦

Public Notice Announcing the Pre-Application Orientation (PAO) for Enrollment of Medicaid Waiver Program Providers

The Department of Aging and Disability Services (DADS) will hold a Pre-Application Orientation (PAO) for persons seeking to participate as a contractor in the Home and Community-based Services (HCS) and/or the Texas Home Living (TxHmL) Medicaid Waiver Programs.

There will be a non-refundable processing fee of $25.00 per registering legal entity. Legal entities that do not attend the PAO will not receive a refund of the processing fee. This fee will cover two representatives per legal entity. No more than two representatives may attend and represent a legal entity. The processing fee must be submitted with the registration form either by money order or cashiers check payable to: Texas Department of Aging and Disability Services. **DADS will not accept cash, personal checks, or company checks**.

**In addition, DADS will no longer be accepting faxes or any other forms of written requests for the registration form. The registration form must be completed online. Persons wanting to attend the PAO must access the registration form from the DADS website at: http://www.dads.state.tx.us/forms/8629/. The registration form will only be available on the DADS website Friday, March 7, 2008, through Friday, May 9, 2008. The registration form must be completed, printed, signed by the authorized representative and returned to DADS**.

Registration forms received by DADS without the processing fee or original signatures ***will not*** **be processed and attendance at the PAO *will not* be allowed. There will be *no exceptions*.**

The PAO will be held at 8:45 a.m., Monday, June 9, 2008, in Austin, Texas at the J. J. Pickle Center. **Registration will close promptly at 8:40 a.m. Arrivals after 8:40 a.m. will *not* be admitted, and will not receive a PAO Certificate of Attendance. (No Exceptions)**

To attend the PAO, an applicant must submit a completed registration form to DADS in a timely manner. A completed registration form is submitted timely only under the following conditions:

(1) if mailed via the US Postal Service, the completed registration form bears a postmark date no later than **Friday, May 9, 2008**; (2) if sent via a common or contract carrier, a receipt by the carrier shows that it was placed in the hands of the carrier no later than **Friday, May 9, 2008**; or (3) if hand delivered, it is delivered directly to the DADS, Community Services Contracts Unit, 701 W. 51st Street (MC W-517), Austin, Texas 78751 no later than **Friday, May 9, 2008**.

Persons requiring an interpreter for the deaf or hearing impaired, or any other reasonable accommodation, must contact Art G. Gonzales at least 72 hours prior to the PAO, at (512) 438-5737.

For any additional information concerning the PAO registration, you may contact Rodrick Pollock, Contract Specialist, at (512) 438-5428. Further information regarding the PAO application process may be obtained on the DADS website at:

http://www.dads.state.tx.us/business/mental_retardation/hcs/index.html

**Criminal History Record Information**

In accordance with 42 Code of Federal Regulations (CFR) §455.106, all applicants must disclose to DADS criminal history record information about all persons with an ownership or control interest in the applicant, or an agent or managing employee of the applicant. Submission of the criminal history record information will be required with the DADS *Application for Participation*.

**National Provider Identifier**

The Health Insurance Portability and Accountability Act (HIPAA) of 1996 requires health care entities to begin using National Provider Identifiers (NPI) on standard health care transactions. DADS requires all health care entities applying to contract with DADS to obtain and report their NPI number. You will be required to submit a NPI assignment

letter or email from the National Plan and Provider Enumeration System (NPPES), along with your *Application for Participation* packet, which will be provided at the PAO.

TRD-200801139
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Filed: February 26, 2008

♦ ♦ ♦

## Office of the Attorney General

### Notice of Settlement of Texas Water Code Enforcement Action

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code. Before the State may settle a judicial enforcement action, pursuant to the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

Case Title and Court: Settlement Agreement in *State of Texas v. Chris Seeman, Individually and d.b.a. Vac Truck Service*; Cause No. D-1-GV-06-002460 in the 53rd Judicial District, Travis County District Court.

Background: This suit alleges violations of the rules promulgated by the Texas Commission on Environmental Quality under the Texas Water Code for violations related to the transportation of sewage and septic waste. The Defendant is Chris Seeman. The suit seeks civil penalties, injunctive relief, attorney's fees, and court costs.

Nature of Settlement: The settlement awards $500.00 in civil penalties, $3,000.00 in past due administrative penalties, and $1,500.00 in attorney's fees to the State. The Judgment also requires the Defendant to comply with all rules related to the transportation of sewage and septic waste.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgments, and written comments on the proposed settlement should be directed to Vanessa Puig-Williams, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0052. Written comments must be received within 30 days of publication of this notice to be considered.

*For more information regarding this publication, contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.*

TRD-200801157
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: February 27, 2008

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### Request for Applications (RFA) for the Sexual Assault Prevention and Crisis Services Program

The Crime Victim Services Division (CVSD) of the Office of the Attorney General (OAG) is soliciting applications from qualified statewide non-profit organizations to utilize funds to provide: (1) services to prevent sexual violence; (2) outreach programs; and (3) technical assistance to support youth and rape crisis centers working to prevent sexual violence.

**Applicable Funding Source:** The source of state funds is a biennial appropriation by the Texas Legislature. All funding is contingent upon the appropriation of funds by the Texas Legislature. The OAG makes no commitment that an application, once submitted, or a grant, once funded, will receive subsequent funding.

**Eligibility Requirements:** To be eligible, an applicant must (1) be a statewide non-profit organization exempt from federal income taxation under §501(c)(3), Internal Revenue Code of 1986; and (2) have a primary purpose of ending sexual violence in this state. A statewide program is an entity that actively offers or provides services in six or more Council of Government "COG" regions.

The OAG will initially screen each application for eligibility. Applications will be deemed ineligible if the application is submitted by an ineligible applicant; the application is not filed in the manner and form required by the RFA or the Application Kit; the application is filed after the deadline established in the RFA or the Application Kit; or the application does not meet other requirements as stated in the RFA or the Application Kit.

**How to Obtain Application Kit:** The OAG will post the Application Kit on the OAG's official agency Web site at http://www.oag.state.tx.us/victims/grants2008.shtml. Updates and other helpful reminders about the application process will also be posted at this location. Potential applicants are encouraged to refer to this site regularly.

**Deadlines and Filing Instructions for the Grant Application:** Refer to the Application Kit for the complete application requirements and instructions.

***Deadline:*** The applicant must submit its application to the OAG and the OAG must receive the submitted application and all required attachments by 5:00 p.m. CST Friday, March 14, 2008 to be considered timely filed.

***Filing Instructions:*** To be considered filed, the Applicant must submit the application by email to CVSGrantsApplications@oag.state.tx.us.

The OAG will not consider an Application if it is not filed by the due date, 5:00 pm CST March 14, 2008.

**Minimum and Maximum Amounts of Funding Available:** For the initial grant contract period (term) the minimum amount of funding statewide programs may apply for is $20,000 and the maximum amount is $100,000.

The amount of the award is determined solely by the OAG. The OAG may award a grant at an amount above or below the established funding level and is not obligated to fund a grant at the amount requested. Based on available funding, the grant contract may be amended for an additional term with an additional amount of funding at the sole discretion of the OAG.

**Start Date and Length of Grant Contract Period:** The initial grant contract period (term) is up to five months from April 1, 2008 through August 31, 2008, subject to and contingent on funding and/or approval by the OAG. The grant contract period (term) may be extended for up to twelve months from September 1, 2008 to August 31, 2009 at the sole discretion of the OAG.

**No Match Requirements:** There are no match requirements for this funding opportunity.

**Volunteer Requirements:** A volunteer component is required. Specific requirements for the volunteer component will be stated in the Application Kit.

**Award Criteria:** The OAG will make funding decisions that support the efficient and effective use of public funds. Scoring components may include, but are not limited to, information provided by the applicant on the organization's capacity, infrastructure, current knowledge, efforts, expertise and experience, and on the proposed project activities and budget.

**Prohibitions on Use of Grant Funds:** OAG grant funds may not be used to support or pay the costs of overtime, dues, or lobbying; any portion of the salary or any other compensation for an elected government official; the purchase of food and beverages except as allowed under Texas State Travel Guidelines; the purchase or lease of vehicles; the purchase of promotional items or recreational activities; out of state travel or costs of travel that are unrelated to the direct delivery of services that support the OAG funded program; the costs for consultants or vendors who participate directly in writing a grant application; or for any unallowable costs set forth in applicable state or federal law, rules, regulations, guidelines, policies, procedures or cost principles. Grant funds may not be used to purchase any other products or services the OAG identifies as inappropriate or unallowable within this RFA or the Application Kit.

**OAG Contact Person:** If additional information is needed, contact Melissa Foley at CVSGrantsApplications@oag.state.tx.us or (512) 463-0826.

*For more information regarding this publication, contact Lauri Saathoff, Agency Liaison, at (512) 463-2096.*

TRD-200801117
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: February 25, 2008

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## Coastal Coordination Council

### Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following projects during the period of February 15, 2008, through February 21, 2008. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on February 27, 2008. The public comment period for these projects will close at 5:00 p.m. on March 28, 2008.

FEDERAL AGENCY ACTIONS:

**Applicant: Ms. Bonnie Fluitt**; Location: The project is located at the Santiago Gonzales Survey A-19, Block 211, Lots 5, 6, and 7, adjacent to and southeast of the intersection of Commerce Street and Second Street (State Highway 185), in the City of Port O'Connor, near Matagorda Bay, in Calhoun County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled "Port O'Connor, Tex.". Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 754150; Northing: 3149150. The proposed compensatory mitigation site is located along the western shoreline of Lavaca Bay, adjacent to Calhoun County Park and NW of Bauer Road, approximately 5 miles NNW of the City of Port Lavaca, in Calhoun County, Texas. The compensatory mitigation site can be located on the U.S.G.S. quadrangle map entitled "Kamey, Tex.". Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 729300; Northing: 3175100. Project Description: The applicant proposes to fill 0.29 acre of wetlands on a 0.71-acre project site to construct a 3-lot single-family residential development. The wetland is high marsh dominated by alkali bulrush (Scirpus robustus), seashore saltgrass (Distichilis spicata), and salt-meadow cordgrass (Spartina patens), and the applicant reports that the wetland site was created when it was used as a borrow site by others. At a separate site 5 miles NNW of the City of Port Lavaca, as compensatory mitigation, the applicant proposes to excavate 0.43 acres of uplands and 0.31 acre of high marsh wetlands to construct 0.10 acre of tidally connected circulation channels and tidal ponds from the uplands, 0.24 acre of transplanted low marsh (Spartina alterniflora) wetlands from the uplands, and 0.06 acre of planted intermediate to high marsh (Distichlis spicata, Borrichia frutescens, and Spartina patens) from the uplands. CCC Project No.: 08-0077-F1; Type of Application: U.S.A.C.E. permit application #SWG-2007-1488 (Corrected) is being evaluated under §404 of the Clean Water Act (33 U.S.C.A. §1344).

**Applicant: Mad, Ltd.**; Location: The project is located south of towns of Sabine and Sabine Pass and east of the Texas Point National Wildlife Refuge along 1st Avenue and adjacent to the Sabine Pass Water Way and the Sabine-Neches Ship Channel. The address for the Mad, Ltd., Sabine Pass Offshore Rig Repair Facility is 8050 South First Street (Jetty Road) in Sabine Pass, Jefferson County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Texas Point, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 417434; Northing: 3286306. Project Description: The applicant proposes to develop an approximately 7.4-acre site for a lay down work area and repair yard for offshore oil rigs with direct deep water access to the Gulf of Mexico via Sabine Pass Channel. The proposed project requires a minimum of three acres for the flat lay down work area and approximately three acres for the rig repair yard with approximately 350 linear feet of bulkheaded deep water frontage. To meet these area and bulkhead frontage requirements, the applicant proposes to realign existing bulkheads, fill portions of an existing boat slip and open waters of the U.S. along the Sabine Pass Channel, and convert an existing work yard on the property. To create an adequately sized flat hard surface lay down work area, the applicant proposes to place clean sand fill into a 0.14-acre adjacent wetland on the property, place clean sand fill into 0.78 acre of open water within an existing boat slip, and install approximately 474 linear feet of new bulkhead. To create adequate open water access, an existing peninsula of man-made land (0.17 acre) and its adjoining bulkhead (approximately 720 linear feet) would be removed. Therefore, this proposed project would result in the placement of fill into 0.78 acre of water and 0.14 acre of wetland and shoreline area and excavation impacts to 0.17 acre of a man-made peninsula. To compensate for jurisdictional impacts the applicant proposes to create one acre of intertidal salt marsh adjacent to the property along an existing shoreline. CCC Project No.: 08-0081-F1; Type of Application: U.S.A.C.E. permit application #SWG-2007-1029 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

**Applicant: Marquette Land Investments**; Location: The project is located adjacent to West Galveston Bay between Eckert's Bayou and the access channel to Spanish Grant subdivision in the City of Galveston, Galveston County, Texas. The project can be located on the

U.S.G.S. quadrangle map entitled: Lake Como, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 312554.78; Northing: 3234637.75. Project Description: The applicant proposes to construct a full service marina and mixed-use development on an approximately 312-acre site on West Galveston Bay. The marina would include docks, launch ramps, dry stack storage, a boat repair facility and a ships store. In addition, single family housing, multi-family housing, restaurants, retail and a hotel would be constructed on the site. The applicant proposes to excavate approximately 500,000 cubic yards of sand to construct a marina basin, an access channel to Spanish Grant, and a circulation channel to Eckert's Bayou. The excavated material would be placed on upland areas to raise the building sites. The proposed marina basin would cover approximately 35 acres and would be excavated to a depth of minus 6 feet mean low tide (MLT). The access channel would be 120 feet wide and 1,200 feet long. The access channel would be excavated to minus 6 feet deep at MLT. The proposed water circulation channel that would be located west of the housing sites would be 120 feet wide by 800 feet long. The water circulation channel would be excavated to minus 2 feet deep. The applicant proposes to construct various types of bulkhead in the marina basin and either articulated block mats or concrete rubble revetment would be installed along the shoreline of the access and exchange channels. The proposed berths would be either fixed or floating, depending on their location in the marina. The applicant proposes to construct approximately 300 in-water slips that would be capable of accommodating boats ranging in size from 25 to 50 feet. The dock layout would vary depending on the mix of slip sizes. Central walkways would typically be 8 to 10 feet and finger piers would range between 2 to 4 feet. The dry stacked storage would have approximately 300 slips for boats up to 35 feet long and 30 in-water slips for boat launch and retrieval. Direct project impacts would include the excavation of 3.9 acres of estuarine wetlands for basin and channel construction and placement of fill into 1.8 acres of palustrine wetlands for building sites and infrastructure. To compensate for impacts to wetlands the applicant proposes to permanently protect a 177-acre (wetlands and uplands) conservation zone. The conservation zone would be deed restricted and turned over to a recognized conservation organization for permanent management. CCC Project No.: 08-0082-F1; Type of Application: U.S.A.C.E. permit application #SWG-2007-1956 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

**Applicant: Marquette Land Investments**; Location: The project is located on West Galveston Island within the City of Galveston and Galveston County, Texas. It begins approximately 1 mile west of the seawall at 8-Mile Road and continues for 3 miles to 11-Mile Road. The project contains most of the property between FM 3005 and Stewart Road, with three parcels totaling 129.34 acres lying on the Gulf side of FM 3005. The project can be located on the U.S.G.S. quadrangle map entitled: Lake Como, Texas. Approximate UTM Coordinates in NAD 83 (meters): Zone 15; Easting: 314204.77; Northing: 3234206.78. Project Description: The applicant proposes to develop a mixed use residential and resort development on 585.85 acres that is comprised of 429.67 acres of coastal prairie uplands, 153.32 acres of palustrine wetlands, and 2.86 acres of estuarine wetlands. The development would include single-family lots, attached single-family units, mid-rise condominiums, commercial areas, common area/parks, internal right-of-ways, and high-rise hotels/condominiums. The direct project impacts would include the placement of fill material into 65 acres of palustrine wetlands to create building sites and infrastructure sites. The applicant proposes to compensate for these proposed impacts by creating a permanently protected 156-acre conservation zone comprised of uplands and wetlands. The conservation zone would be deed restricted and turned over to a recognized conservation organization for permanent management. In addition, the applicant proposes a combination of recovery of existing degraded palustrine wetlands plus additional wetland construction in the conservation zone. CCC Project No.: 08-0083-F1; Type of Application: U.S.A.C.E. permit application #SWG-2007-1958 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200801158

Larry L. Laine

Chief Clerk/Deputy Land Commissioner, General Land Office

Coastal Coordination Council

Filed: February 27, 2008

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## Office of Consumer Credit Commissioner

### Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, 303.008, 303.009, 304.003, and 346.101, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 03/03/08 - 03/09/08 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 03/03/08 - 03/09/08 is 18% for Commercial over $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009[3] for the period of 02/01/08 - 02/29/08 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The monthly ceiling as prescribed by §303.005 and §303.009 for the period of 02/01/08 - 02/29/08 is 18% for Commercial over $250,000.

The standard quarterly rate as prescribed by §303.008 and §303.009 for the period of 04/01/08 - 06/30/08 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The standard quarterly rate as prescribed by §303.008 and §303.009 for the period of 04/01/08 - 06/30/08 is 18% for Commercial over $250,000.

The retail credit card quarterly rate as prescribed by §303.009[1] for the period of 04/01/08 - 06/30/08 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The lender credit card quarterly rate as prescribed by §346.101 Texas Finance Code[1] for the period of 04/01/08 - 06/30/08 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The standard annual rate as prescribed by §303.008 and §303.009[4] for the period of 04/01/08 - 06/30/08 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The standard annual rate as prescribed by §303.008 and §303.009 for the period of 04/01/08 - 06/30/08 is 18% for Commercial over $250,000.

The retail credit card annual rate as prescribed by §303.009[1] for the period of 04/01/08 - 06/30/08 is 18% for Consumer/Agricultural/Commercial/credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 03/01/08 - 03/31/08 is 6.00% for Consumer/Agricultural/Commercial/credit through $250,000.

The judgment ceiling as prescribed §304.003 for the period of 03/01/08 - 03/30/08 is 6.00% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

[3]For variable rate commercial transactions only.

[4]Only for open-end credit as defined in §301.002(14), Texas Finance Code.

TRD-200801126
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 25, 2008

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## Texas Education Agency

### Notice of Correction: Request for Applications Concerning Mathematics Instructional Coaches Pilot Program, 2008-2010

The Texas Education Agency (TEA) published Request for Applications (RFA) #701-08-105 Concerning Mathematics Instructional Coaches Pilot Program, 2008-2010, in the February 8, 2008, issue of the *Texas Register* (33 TexReg 1162).

The TEA is amending the deadline for receipt of applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Tuesday, April 15, 2008, to be eligible to be considered for funding. This correction reflects a change from the original deadline date of Tuesday, April 1, 2008.

Further Information. For clarifying information about the RFA, contact Donnell Bilsky, Division of Discretionary Grants, TEA, (512) 463-9445, or Dale Fowler, Division of State Initiatives, TEA, (512) 936-6060.

TRD-200801162
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 27, 2008

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### Notice of Correction: Request for Applications Concerning Student Excellence and Readiness through Volunteers in Education (SERVE), 2007-2008 and 2008-2009

The Texas Education Agency (TEA) published Request for Applications (RFA) #701-07-132 Concerning Student Excellence and Readiness through Volunteers in Education (SERVE), 2007-2008 and 2008-2009, in the February 22, 2008, issue of the *Texas Register* (33 TexReg 1621).

The TEA is amending the deadline for receipt of applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Tuesday, April 15, 2008, to be eligible to be considered for funding. This correction reflects a change from the original deadline date of Friday, March 28, 2008.

Further Information. For clarifying information about the RFA, contact Donnell Bilsky, Division of Discretionary Grants, TEA, (512) 463-9445, or Kristen Reynolds, Division of State Initiatives, TEA, (512) 936-6060.

TRD-200801161
Cristina De La Fuente-Valadez
Director, Policy Coordination Division
Texas Education Agency
Filed: Feburary 27, 2008

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### Request for Applications Concerning the Campus Turnaround Team Support Grant, 2008-2010

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under RFA #701-08-101 from public or private nonprofit entities, including colleges, universities, and education service centers (ESCs) to provide coordinated training to members of Technical Assistance Teams (TATs), improvement planning teams, and Campus Intervention Teams (CITs) from campuses rated *Academically Unacceptable* under the state accountability rating system to ensure well-functioning and effective teams that support the efforts of campuses to become high-performing and successful with all students. For-profit entities are not eligible to apply.

Description. The purpose of the Campus Turnaround Team Support grant is to provide training to personnel from each of the 20 ESCs who are designated as members of the regional turnaround training and support teams. These regional teams will train and support members of TATs, CITs, and campus improvement leadership teams in order to build capacity for school improvement on low-performing campuses. The grant recipient will use a training-of-trainers model to develop materials and provide extensive training and ongoing support to the regional turnaround training and support teams.

Dates of Project. The Campus Turnaround Team Support Grant, 2008-2010, will be implemented during the 2008-2009 and 2009-2010 school years. Applicants should plan for a starting date of no earlier than August 15, 2008, and an ending date of no later than February 28, 2010.

Project Amount. Funding will be provided for one project. The project will receive a maximum of $1.25 million for the 2008-2009 and 2009-2010 school years. Project funding in subsequent grant years will be based on satisfactory progress of the first-year objectives and activities and on general budget approval by the commissioner of education and the state legislature.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of RFA #701-08-101 may be obtained by writing the Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and phone number including area code. The announcement letter and complete RFA will also be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms/ for viewing and downloading.

Further Information. For clarifying information about the RFA, contact Jan Foster, Division of Program Monitoring and Interventions, Texas Education Agency, (512) 463-9414. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any information that is different from or in addition to information provided in the RFA will be provided only in response to written inquiries. Copies of all such inquiries and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms/ for viewing and downloading.

Deadline for Receipt of Applications. Applications must be received in the Document Control Center of the Texas Education Agency by 5:00 p.m. (Central Time), Thursday, April 24, 2008, to be eligible to be considered for funding.

TRD-200801160
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: February 27, 2008

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## Texas Commission on Environmental Quality

### Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that, before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **April 7, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on April 7, 2008**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Broadway Grocery, Inc.; DOCKET NUMBER: 2007-1633-PST-E; IDENTIFIER: RN101876498; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 Texas Administrative Code (TAC) §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor the underground storage tanks (USTs) for releases; PENALTY: $5,100; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Dewberry Investments, Ltd. dba Dewberry Investments Monterrey Hills; DOCKET NUMBER: 2008-0186-WQ-E; IDENTIFIER: RN105384077; LOCATION: Del Valle, Bastrop County, Texas; TYPE OF FACILITY: storm water; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(3) COMPANY: Curtis Hamlin dba H & S Quik Stop; DOCKET NUMBER: 2005-1321-PST-E; IDENTIFIER: RN101848489; LOCATION: Crockett, Houston County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(4)(C) and the Code, §26.3475(d), by failing to inspect and test the cathodic protection system; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to monitor pressurized piping associated with the UST system; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to have the line leak detectors tested; 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to reconcile inventory control records; and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs; PENALTY: $6,750; ENFORCEMENT COORDINATOR: Shontay Wilcher, (512) 239-2136; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(4) COMPANY: Happy Hill Farm Children's Home, Inc.; DOCKET NUMBER: 2007-1247-PWS-E; IDENTIFIER: RN101236990; LOCATION: Somervell County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(f)(3)(A) and §290.46(f)(3)(E)(iv), by failing to keep on file and make available for commission review all water system operating records; 30 TAC §290.41(c)(1)(F), by failing to provide a sanitary control easement that covers land within 150 feet of Well Numbers 1, 2, and 3; 30 TAC §290.41(c)(3)(P), by failing to provide an all-weather access road to the well site; 30 TAC §290.41(c)(3)(N), by failing to provide flow measuring devices to measure production yields and provide for the accumulation of water production data; 30 TAC §290.43(c)(4), by failing to provide a liquid level indicator on the ground storage tank; 30 TAC §290.46(u), by failing to plug and seal an abandoned public water supply well or to return the well to a non-deteriorated condition; 30 TAC §290.46(d)(2)(A) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to operate the disinfection equipment to maintain a free chlorine residual of at least 0.2 milligrams per liter throughout the distribution system at all times; and 30 TAC

§290.121(a) and (b), by failing to maintain an up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories; PENALTY: $1,520; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: City of Hemphill; DOCKET NUMBER: 2007-1806-MWD-E; IDENTIFIER: RN101918134; LOCATION: Hemphill, Sabine County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010493002, Interim and Final Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for total suspended solids (TSS); PENALTY: $5,550; Supplemental Environmental Project (SEP) offset amount of $4,440 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Wastewater Treatment Assistance; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(6) COMPANY: City of Hooks; DOCKET NUMBER: 2007-1889-MWD-E; IDENTIFIER: RN101916468; LOCATION: Bowie County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010507001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permit effluent limits for TSS and total ammonia nitrogen; and 30 TAC §305.125(17) and TPDES Permit Number WQ0010507001, Sludge Provisions, by failing to submit the annual sludge report; PENALTY: $6,180; ENFORCEMENT COORDINATOR: Heather Brister, (254) 751-0335; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(7) COMPANY: Houston Refining LP; DOCKET NUMBER: 2007-1954-AIR-E; IDENTIFIER: RN100218130; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §115.722(c)(1) and §116.715(c), TCEQ Permit Number 2167, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $20,000; Supplemental Environmental Project (SEP) offset amount of $10,000 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: Huntsman Petrochemical Corporation; DOCKET NUMBER: 2006-1775-MLM-E; IDENTIFIER: RN100217389 and RN104340013; LOCATION: Port Arthur and Port Neches, Jefferson County, Texas; TYPE OF FACILITY: petrochemical manufacturing plant and public water supply; RULE VIOLATED: 30 TAC §§101.20(3), 116.715(a) and (c)(7), and 122.143(4), Air Flexible Permit Number 16989/PSD-TX-794, SC 1, Federal Operating Permit (FOP) O-01317, General Terms and Conditions (GTC) and SC 16, and THSC, §382.085(b), by failing to maintain an emission rate below the allowable emission limit; 30 TAC §§101.20(3), 116.715(a) and (c)(7), and 122.143(4), Air Flexible Permit Number 16989/PSD-TX-794, SC 1, FOP O-01317, GTC and SC 16, and THSC, §382.085(b), by failing to prevent unauthorized emissions and maintain an emission rate below the authorized emission limit; and 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to perform routine bacteriological monitoring of the public water system and by failing to provide public notice of the failure to perform routine bacteriological monitoring; PENALTY: $98,263; Supplemental Environmental Project (SEP) offset amount of $49,131 applied to South East Texas Regional Planning Commission-West Port Arthur Home Energy Efficiency Program; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(9) COMPANY: City of Kerens; DOCKET NUMBER: 2005-1166-MWD-E; IDENTIFIER: RN101919553; LOCATION: Navarro County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10745001, Permit Conditions Number 2(g), and the Code, §26.121(a)(1), by failing to prevent an unauthorized discharge from storm water inflow and infiltration; PENALTY: $3,300; Supplemental Environmental Project (SEP) offset amount of $2,640 applied to holding a one-day event for the collection, recycling, or disposal of tires, batteries, electronics, and lawn clippings; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Sammy Rene Lugo; DOCKET NUMBER: 2007-1819-LII-E; IDENTIFIER: RN105305312; LOCATION: Corpus Christi, Nueces County, Texas; TYPE OF FACILITY: landscape irrigation business; RULE VIOLATED: 30 TAC §30.5(b) and §344.4(a), Texas Occupations Code, §1903.251, and the Code, §37.003, by failing to refrain from advertising or representing himself to the public as a person who can perform services for which a license or registration is required when not possessing a current license or registration; PENALTY: $262; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(11) COMPANY: McEachern Enterprises, Inc. dba Superior Clean Can; DOCKET NUMBER: 2007-1716-MLM-E; IDENTIFIER: RN105148852; LOCATION: Round Rock, Williamson County, Texas; TYPE OF FACILITY: portable sanitation company; RULE VIOLATED: the Code, §26.121(a), by failing to prevent the unauthorized discharge of spent wash water; and 30 TAC §213.5(b)(4)(D)(ii)(1), by failing to obtain approval of an Edwards Aquifer Pollution Prevention Plan; PENALTY: $3,150; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(12) COMPANY: City of Moran; DOCKET NUMBER: 2007-1615-MWD-E; IDENTIFIER: RN101918365; LOCATION: Moran, Shackelford County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §§305.125(5), 317.4(i) and 317.5(e)(l), and Waste Water Permit Number 11420001, Special Provision Number 3, by failing to properly maintain the growth of vegetation on the banks of the stabilization pond and maintain the structural condition of the drying bed; the Code, §26.121(a)(1) and Waste Water Permit Number 11420001, Standard Provision 2b, by failing to prevent the unauthorized discharges from the wastewater treatment plant; 30 TAC §305.125(1), Waste Water Permit Number 11420001, Effluent Limitation and Monitoring Requirements IV.A., and the Code, §26.121(a), by failing to meet the five-day biochemical oxygen demand ($BOD_5$), 30 TAC §319.11(b), by failing to properly analyze the pH within the required 15-minute hold time; and 30 TAC §305.125(1) and Waste Water Permit Number 11420001, Standard Provision 2a, by failing to notify the TCEQ Regional Office of the unauthorized discharge within 24 hours; PENALTY: $6,300; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(13) COMPANY: New Waverly Ventures Ltd. Co.; DOCKET NUMBER: 2007-1773-IWD-E; IDENTIFIER: RN100214493; LOCATION: Walker County, Texas; TYPE OF FACILITY: wastewater treatment system; RULE VIOLATED: 30 TAC §305.125(1), TPDES

Permit Number WQ0001905000, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for chemical oxygen demand, TSS, and fecal coliform bacteria; and 30 TAC §305.125(1) and §319.5(b) and TPDES Permit Number WQ0001905000, Effluent Limitations and Monitoring Requirements Number 1, by failing to collect and analyze samples for each parameter; PENALTY: $7,515; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: Orange County Water Control and Improvement District Number 2; DOCKET NUMBER: 2007-1673-MWD-E; IDENTIFIER: RN101614030; LOCATION: West Orange, Orange County, Texas; TYPE OF FACILITY: wastewater treatment system; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0010240001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, and the Code, §26.121(a), by failing to comply with the permitted effluent limitations for $BOD_5$, total chlorine, total copper, and TSS; PENALTY: $14,200; ENFORCEMENT COORDINATOR: Andrew Hunt, (512) 239-1203; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(15) COMPANY: Petro Stopping Centers, L.P. dba Petro Stopping Center 4; DOCKET NUMBER: 2007-1706-PST-E; IDENTIFIER: RN102424884; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: travel center with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.48(a), by failing to prevent an unauthorized discharge of diesel fuel; 30 TAC §334.78(c), by failing to submit a site assessment report; 30 TAC §334.48(d) and the Code, §26.3475(c)(2), by failing to ensure spill and overfill prevention equipment is properly operated and maintained; 30 TAC §334.51(a)(4)(A) and the Code, §26.3475(c)(2), by failing to ensure that facility personnel conducting the transfer operation of a regulated substance is physically present at or near the transfer point to abate any spill or overfill; and 30 TAC §334.10(b) and §334.50(e)(2)(C), by failing to maintain records of results for all manual and/or automatic methods of monitoring for releases; PENALTY: $16,050; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(16) COMPANY: SPX Corporation; DOCKET NUMBER: 2007-1768-MWD-E; IDENTIFIER: RN102202462; LOCATION: Harris County, Texas; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0012397001, Final Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limitations for TSS, $BOD_5$, and ammonia nitrogen; PENALTY: $3,060; Supplemental Environmental Project (SEP) offset amount of $1,224 applied to Gulf Coast Waste Disposal Authority ("GCWDA") - River, Lakes, Bays 'N Bayous Trash Bash; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: Texas Department of Criminal Justice; DOCKET NUMBER: 2007-1705-MWD-E; IDENTIFIER: RN102315199; LOCATION: Walker County, Texas; TYPE OF FACILITY: wastewater treatment system; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 0011180001, Effluent Limitations and Monitoring Requirements Numbers 1 and 3, and the Code, §26.121(a), by failing to comply with the permit effluent limits for pH and ammonia nitrogen; and 30 TAC §325.5(d) and the Code, §5.702, by failing to pay assessed water quality fees; PENALTY: $3,220; Supplemental Environmental Project (SEP) offset amount of $2,576 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Abandoned Tire Clean-Up; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: TurboCare, Inc.; DOCKET NUMBER: 2007-1458-PWS-E; IDENTIFIER: RN101235489; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: turbine repair and maintenance facility with a public water supply; RULE VIOLATED: 30 TAC §290.45(d)(2)(A)(ii) and THSC, §341.0315(c), by failing to provide a minimum pressure tank capacity of 220 gallons; PENALTY: $210; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(19) COMPANY: Upper Trinity Regional Water District; DOCKET NUMBER: 2007-1525-MWD-E; IDENTIFIER: RN102079076; LOCATION: Denton County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10698002, Interim II Effluent Limitations and Monitoring Requirements Number 1, Outfalls 001 and 002, and the Code, §26.121(a), by failing to comply with permitted effluent limitations for ammonia nitrogen; PENALTY: $3,400; Supplemental Environmental Project (SEP) offset amount of $2,720 applied to holding a one-day household hazardous waste collection event in Denton County at no cost to citizens; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(20) COMPANY: ZZQ Enterprises, Inc. dba Mini Mart Food Store FFP 3840; DOCKET NUMBER: 2007-1887-PST-E; IDENTIFIER: RN102356078; LOCATION: Irving, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.242(9) and THSC, §382.085(b), by failing to post operating instructions conspicuously on the front of each gasoline dispensing pump; 30 TAC §334.10(b), by failing to have the required UST records maintained, readily accessible, and available for the inspection upon request by agency personnel; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to ensure that all USTs are monitored in a manner which will detect a release at a frequency of at least once every month; and 30 TAC §334.50(d)(1)(B)(ii) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; PENALTY: $4,725; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200801137
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 26, 2008

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## Enforcement Orders

An agreed order was entered regarding Herminia Witherspoon dba Nick's Conoco, Docket No. 2005-0285-PST-E on February 14, 2008 assessing $2,850 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Robert Mosley, Staff Attorney at (512) 239-0627, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Grand Saline, Docket No. 2005-0666-MLM-E on February 14, 2008 assessing $17,920 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kimberly Morales, Enforcement Coordinator at (713) 422-8938, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Cranfills Gap, Docket No. 2005-1134-MWD-E on February 14, 2008 assessing $16,100 in administrative penalties with $3,220 deferred.

Information concerning any aspect of this order may be obtained by contacting Lindsey Jones, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Amir Tell dba Quick Stop 1, Docket No. 2005-1876-PST-E on February 14, 2008 assessing $100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jacquelyn Boutwell, Staff Attorney at (512) 239-5846, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Tahoka, Docket No. 2005-1897-PWS-E on February 14, 2008 assessing $7,150 in administrative penalties with $1,430 deferred.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Inara Convenience, Inc. dba Rosedale Texaco, Docket No. 2006-0123-PST-E on February 14, 2008 assessing $40,610 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kathleen Decker, Staff Attorney at (512) 239-6500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Racetrac Petroleum, Inc. dba Racetrac 512, Docket No. 2006-0378-PWS-E on February 14, 2008 assessing $1,200 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Cox, Staff Attorney at (512) 239-0974, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ExxonMobil Oil Corporation, Docket No. 2006-0498-AIR-E on February 14, 2008 assessing $10,324 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Alfred Oloko, Staff Attorney at (713) 422-8918, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jin Park dba Lah Cleaners, Docket No. 2006-1193-DCL-E on February 14, 2008 assessing $1,185 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Patrick Jackson, Staff Attorney at (512) 239-6501, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of De Kalb, Docket No. 2006-1392-MWD-E on February 14, 2008 assessing $9,675 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Laurencia Fasoyiro, Staff Attorney at (713) 422-8914, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Amir Ali Momin dba Shop N Go, Docket No. 2006-1915-PST-E on February 14, 2008 assessing $18,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin Thompson, Staff Attorney at (512) 239-1297, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Maxim Farm Egg Co. Inc., Docket No. 2006-2244-AIR-E on February 14, 2008 assessing $4,160 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at (512) 239-0063, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ConocoPhillips Company, Docket No. 2007-0053-AIR-E on February 14, 2008 assessing $135,538 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Shawn Slack, Staff Attorney at (512) 239-0063, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Reza S. Mousavi dba Bernard's Liquor Store, Docket No. 2007-0074-PWS-E on February 14, 2008 assessing $312 in administrative penalties with $62 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Anthony Vaughn dba Wildwood Mobile Home Village, Docket No. 2007-0111-MSW-E on February 14, 2008 assessing $1,070 in administrative penalties with $214 deferred.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Formosa Plastics Corporation, Texas, Docket No. 2007-0230-AIR-E on February 14, 2008 assessing $6,422 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Post, Docket No. 2007-0341-MWD-E on February 14, 2008 assessing $14,450 in administrative penalties with $2,890 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Brister, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding CO2 Cleaning Services, Inc., Docket No. 2007-0345-MLM-E on February 14, 2008 assessing $2,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Cox, Staff Attorney at (512) 239-0974, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Ray Johnson, Docket No. 2007-0442-PST-E on February 14, 2008 assessing $21,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Benjamin Thompson, Staff Attorney at (512) 239-1297, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding 100 Century Oaks, Ltd. dba Worthham Oaks, Docket No. 2007-0489-MLM-E on February 14, 2008 assessing $33,500 in administrative penalties with $6,700 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Albrecht, Enforcement Coordinator at (713) 767-3672, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Equistar Chemicals, LP, Docket No. 2007-0519-AIR-E on February 14, 2008 assessing $40,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Motiva Enterprises LLC, Docket No. 2007-0586-MLM-E on February 14, 2008 assessing $29,362 in administrative penalties with $5,872 deferred.

Information concerning any aspect of this order may be obtained by contacting Daniel Siringi, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dennis James Schouten dba Dennis Schouten Dairy, Docket No. 2007-0624-AGR-E on February 14, 2008 assessing $2,340 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Dinniah Chahin, Staff Attorney at (512) 239-0617, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding International Paper Company, Docket No. 2007-0666-IWD-E on February 14, 2008 assessing $6,372 in administrative penalties with $1,274 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Garland, Docket No. 2007-0749-IWD-E on February 14, 2008 assessing $6,000 in administrative penalties with $1,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Pam Campbell, Enforcement Coordinator at (512) 239-4493, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brazos Valley Petroleum Corporation dba In & Out 7, Docket No. 2007-0759-PST-E on February 14, 2008 assessing $1,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Anna Cox, Staff Attorney at (512) 239-0974, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Roger Wall dba Wall's Tire Service, Docket No. 2007-0761-MSW-E on February 14, 2008 assessing $5,250 in administrative penalties with $1,050 deferred.

Information concerning any aspect of this order may be obtained by contacting Dana Shuler, Enforcement Coordinator at (512) 239-2505, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Firestone Polymers LLC, Docket No. 2007-0767-AIR-E on February 14, 2008 assessing $27,625 in administrative penalties with $5,525 deferred.

Information concerning any aspect of this order may be obtained by contacting Daniel Siringi, Enforcement Coordinator at (409) 899-8799, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding King-Isles, Inc. dba King Isles Vista Hermosa, Docket No. 2007-0926-WQ-E on February 14, 2008 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding The Premcor Refining Group Inc., Docket No. 2007-0956-AIR-E on February 14, 2008 assessing $25,150 in administrative penalties with $5,030 deferred.

Information concerning any aspect of this order may be obtained by contacting Aaron Houston, Enforcement Coordinator at (409) 899-8784, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Department of Criminal Justice, Docket No. 2007-0983-MWD-E on February 14, 2008 assessing $13,360 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Shelton, Enforcement Coordinator at (512) 239-2563, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GSW Cleaners, Inc. dba GSW Cleaners, Docket No. 2007-0984-DCL-E on February 14, 2008 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of DeSoto, Docket No. 2007-1044-WQ-E on February 14, 2008 assessing $18,825 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Thelin Recycling Company, L.P., Docket No. 2007-1092-AIR-E on February 14, 2008 assessing $9,100 in administrative penalties with $1,820 deferred.

Information concerning any aspect of this order may be obtained by contacting James Nolan, Enforcement Coordinator at (512) 239-6634, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Barten Industrial Coatings, LLC, Docket No. 2007-1108-AIR-E on February 14, 2008 assessing $4,000 in administrative penalties with $800 deferred.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 676-3500, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Craig J. Dickson, Docket No. 2007-1156-PWS-E on February 14, 2008 assessing $1,395 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Steve Claubaugh dba Discount Materials, Docket No. 2007-1159-MSW-E on February 14, 2008 assessing $4,000 in administrative penalties with $800 deferred.

Information concerning any aspect of this order may be obtained by contacting Colin Barth, Enforcement Coordinator at (512) 239-0068, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BLR Construction Companies, L.L.C., Docket No. 2007-1163-AIR-E on February 14, 2008 assessing $20,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TRI Century Management Solutions, Inc. dba Lance Friday Homes, Docket No. 2007-1169-WQ-E on February 14, 2008 assessing $410 in administrative penalties with $82 deferred.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Joe E. Panagopoulos dba Metro Materials, Docket No. 2007-1182-MSW-E on February 14, 2008 assessing $1,000 in administrative penalties with $200 deferred.

Information concerning any aspect of this order may be obtained by contacting Marlin Bullard, Enforcement Coordinator at (254) 751-0338, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Oasis Pipe Line Company Texas L.P., Docket No. 2007-1206-AIR-E on February 14, 2008 assessing $1,200 in administrative penalties with $240 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pottsboro Independent School District, Docket No. 2007-1209-AGR-E on February 14, 2008 assessing $3,150 in administrative penalties with $630 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Granbury, Docket No. 2007-1231-PWS-E on February 14, 2008 assessing $715 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Galileo Mount Houston TX LP dba Mount Houston Utilities, Docket No. 2007-1232-MWD-E on February 14, 2008 assessing $35,490 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Westwind Enterprises, Ltd. dba Cedar Grove Manufactured Home Community, Docket No. 2007-1252-WQ-E on February 14, 2008 assessing $3,300 in administrative penalties with $660 deferred.

Information concerning any aspect of this order may be obtained by contacting Pam Campbell, Enforcement Coordinator at (512) 239-4493, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Southwest-Tex Leasing Co., Inc. dba Advantage Rent-A-Car, Docket No. 2007-1256-AIR-E on February 14, 2008 assessing $920 in administrative penalties with $184 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Fort Bend County Municipal Utility District 30, Docket No. 2007-1282-MWD-E on February 14, 2008 assessing $6,680 in administrative penalties with $1,336 deferred.

Information concerning any aspect of this order may be obtained by contacting Tom Jecha, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Quinlan, Docket No. 2007-1283-MWD-E on February 14, 2008 assessing $6,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Mont Belvieu, Docket No. 2007-1293-MWD-E on February 14, 2008 assessing $18,900 in administrative penalties with $3,780 deferred.

Information concerning any aspect of this order may be obtained by contacting Cynthia McKaughan, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Harris County Municipal Utility District No. 189, Docket No. 2007-1298-MWD-E on February 14, 2008 assessing $2,040 in administrative penalties with $408 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Cemex Construction Materials L.P., Docket No. 2007-1314-AIR-E on February 14, 2008 assessing $4,950 in administrative penalties with $990 deferred.

Information concerning any aspect of this order may be obtained by contacting Trina Grieco, Enforcement Coordinator at (210) 403-4006, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding ALBERTSON'S LLC dba Albertson's Express 1016, Docket No. 2007-1326-AIR-E on February 14, 2008 assessing $1,220 in administrative penalties with $244 deferred.

Information concerning any aspect of this order may be obtained by contacting Kimberly Morales, Enforcement Coordinator at (713) 422-8938, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Delta Bevco, Inc. dba Delta Food 2, Docket No. 2007-1353-PST-E on February 14, 2008 assessing $2,140 in administrative penalties with $428 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Johnson Controls Battery Group, Inc., Docket No. 2007-1354-AIR-E on February 14, 2008 assessing $1,800 in administrative penalties with $360 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Willow Park, Docket No. 2007-1366-MWD-E on February 14, 2008 assessing $9,200 in administrative penalties with $1,840 deferred.

Information concerning any aspect of this order may be obtained by contacting Lynley Doyen, Enforcement Coordinator at (512) 239-1364, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Itasca, Docket No. 2007-1373-PWS-E on February 14, 2008 assessing $218 in administrative penalties with $43 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Egg Products, LLC, Docket No. 2007-1388-WQ-E on February 14, 2008 assessing $950 in administrative penalties with $190 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Southwest Texas District of the Pentacostal Church of God, Inc., Docket No. 2007-1391-PWS-E on February 14, 2008 assessing $1,887 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Christopher Keffer, Enforcement Coordinator at (512) 239-5610, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Exxon Mobil Corporation, Docket No. 2007-1403-AIR-E on February 14, 2008 assessing $10,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting John Muennink, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Chevron Phillips Chemical Company LP, Docket No. 2007-1419-AIR-E on February 14, 2008 assessing $10,229 in administrative penalties with $2,045 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LANXESS Corporation, Docket No. 2007-1429-AIR-E on February 14, 2008 assessing $3,050 in administrative penalties with $610 deferred.

Information concerning any aspect of this order may be obtained by contacting Libby Hogue, Enforcement Coordinator at (512) 239-1165, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Southern Union Gas Services, Ltd., Docket No. 2007-1430-AIR-E on February 14, 2008 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting James Nolan, Enforcement Coordinator at (512) 239-6634, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Gas Solutions II Ltd., Docket No. 2007-1473-AIR-E on February 14, 2008 assessing $1,875 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Sidney Wheeler, Enforcement Coordinator at (512) 239-2171 Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Wharton County Power Partners, L.P., Docket No. 2007-1478-AIR-E on February 14, 2008 assessing $11,000 in administrative penalties with $2,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Lindsey Jones, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding McLennan County Water Control and Improvement District No. 2, Docket No. 2007-1504-PWS-E on February 14, 2008 assessing $460 in administrative penalties with $92 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Clausewitz, Enforcement Coordinator at (210) 403-4012, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Shintech Incorporated, Docket No. 2007-1527-AIR-E on February 14, 2008 assessing $2,475 in administrative penalties with $495 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Quebecor World Dallas II Inc., Docket No. 2007-1568-AIR-E on February 14, 2008 assessing $7,700 in administrative penalties with $1,540 deferred.

Information concerning any aspect of this order may be obtained by contacting Suzanne Walrath, Enforcement Coordinator at (512) 239-2134, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tarken Builders, Ltd., Docket No. 2007-1585-WQ-E on February 14, 2008 assessing $2,000 in administrative penalties with $400 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrew Hunt, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Petrochemicals LP, Docket No. 2007-1675-AIR-E on February 14, 2008 assessing $6,500 in administrative penalties with $1,300 deferred.

Information concerning any aspect of this order may be obtained by contacting Nadia Hameed, Enforcement Coordinator at (713) 767-3629, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Texas Department of Transportation, Docket No. 2007-1892-PST-E on February 14, 2008 assessing $1,750 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, SEP Coordinator at (512) 239-1768, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding Mohammad Adil Aqil, Docket No. 2004-1663-PST-E on February 15, 2008 assessing $3,280 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Audra Ruble, Enforcement Coordinator at (361) 825-3126, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-200801167
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 27, 2008

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## Notice of Meeting on April 17, 2008, in Somerset, Texas, Concerning the Pioneer Oil and Refining Proposed State Superfund Site

The purpose of the meeting is to obtain public input and information concerning the proposed remedy for the Pioneer Oil and Refining state Superfund site (the site).

The executive director of the Texas Commission on Environmental Quality (TCEQ or commission) is issuing this public notice of a proposed selection of remedy for the site. In accordance with 30 TAC §335.349(a) concerning requirements for the remedial action, and Texas Health and Safety Code (THSC), §361.187, concerning the proposed remedial action, a public meeting regarding the commission's selection of a proposed remedy for the site shall be held. The statute requires that the commission shall publish notice of the meeting in the *Texas Register* and in a newspaper of general circulation in the county in which the facility is located at least 30 days before the date of the public meeting. This notice was also published in the *San Antonio Express-News*, on March 7, 2008, and the *Lytle Leader-News* in Lytle, Texas, on March 6, 2008.

The public meeting is scheduled for April 17, 2008, at 7:00 p.m., at the Somerset City Hall, 7360 East 6th Street, Somerset, Texas. The public meeting is not a contested case hearing under the Texas Government Code, Chapter 2001.

The site for which a remedy is being proposed, the site was proposed for listing on the state registry of Superfund sites on September 25, 1990 (15 TexReg 5623) and accepted into the State Superfund Program. The real property, a 12-acre tract on which the Pioneer Oil refinery was located, was operated as a refinery between the late 1910's and the late 1940's. Business names associated with the site included Rainbow Oil and Refining Company, Slimp Oil Company, and Pioneer Oil. Rainbow conveyed the refinery and the lease to Pioneer Oil and Refining Company in 1920. Pioneer was dissolved in 1949. Property ownership was in the Kurz family (prior to 1961), J.W. and Mary L. James from 1961 - 1977, and the City of Somerset (1977 - present).

Oil and oil products, including roofing tar, were produced during the operation at the facility. During the operation, the facility had at least 25 aboveground tanks, at least five refining buildings, a pond and two sludge ponds, and a rail service to transport products. Two sludge ponds, two oil wells, two brick aboveground tanks, and several buildings associated with the refining process still remain on site.

The TCEQ has conducted a Hazard Ranking System evaluation of the site and the site earned a Hazard Ranking System score of 24.54, which qualified the site for the State Superfund program. A Remedial Investigation was conducted by the TCEQ. The Remedial Investigation determined that the sludge in the two impoundments and soil in the contaminated areas have lead, benzene and total petroleum hydrocarbons over the critical protective concentration level. The sludge in the ponds has a pH less than 2. Groundwater was determined to be contaminated with arsenic, lead, benzene and total petroleum hydrocarbons above the critical protective concentration level. Treatability studies were conducted to determine remedies for the soil and sludge and the groundwater.

Based on the results of the treatability studies, a feasibility study, dated January 2008, screened and evaluated remedies for the site. The Feasibility Study report evaluated four remedies each for the contaminated soil and sludge and for the contaminated groundwater. These remedies were combined to identify the most effective remedial alternative in terms of technical feasibility, reliability, and costs which will effectively mitigate and minimize the damage to the environment and provide adequate protection of public health.

Based on these criteria the TCEQ recommends: 1) excavation of contaminated soil and sludge from the west pond with consolidation of the excavated materials into the east pond. The excavated soil and sludge will be mixed with lime, cement, or similar materials to increase the pH to around 8.0 and to increase the compressive strength of the mixture to withstand the weight of an engineered cap; and 2) a plume management zone with monitored natural attenuation for the contaminated groundwater. The remedy will also include installation of a fence and warning

signs around the perimeter of the cap to restrict access. A deed notice will be recorded describing the containment area and the plume management zone area. Post-closure maintenance of the cap and groundwater monitoring will be conducted to assess the effectiveness of the remediation effort. The recommended alternative is the most cost effective, reasonable, and appropriate remedy to address the site.

All persons desiring to make comments may do so prior to or at the public meeting. All comments submitted *prior* to the public meeting must be received in writing by 5:00 p.m. on April 16, 2008 **and should be sent in writing** to Mr. Subhash C. Pal, P.E., Project Manager, Texas Commission on Environmental Quality, Remediation Division, State Lead Section, MC 136, P.O. Box 13087, Austin, Texas 78711-3087, or facsimile at (512) 239-2450. The public comment period for this action will end at the close of the public meeting on April 17, 2008.

A portion of the record for this site including documents pertinent to the proposed remedy is available for review during regular business hours at the San Antonio Public Library, 600 Soledad, San Antonio, Texas or the City of Somerset Administrative Office, 7360 East 6th Street, Somerset, Texas. Copies of the complete public record file may be obtained during business hours at the commission's Records Management Center, Building E, First Floor, Records Customer Service, MC 199, 12100 Park 35 Circle, Austin, Texas 78753, (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

Information is also available regarding the state Superfund program at *www.tceq.state.tx.us/remediation/superfund/index.html*.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact the agency at (800) 633-9363 or (512) 239-5674. Requests should be made as far in advance as possible.

For further information about this site or the public meeting, please call John Flores, TCEQ Community Relations, at (800) 633-9363, extension 5674.

TRD-200801136
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 26, 2008

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## Notice of Proposed Amendment and Renewal of a General Permit Authorizing the Discharge of Wastewater

The Texas Commission on Environmental Quality (TCEQ) proposes to amend and renew a general permit (Texas Pollutant Discharge Elimination System Permit No. TXG530000) authorizing the discharge of waste from certain on-site treatment systems connected to single family residences located within the San Jacinto River Basin in Harris County into or adjacent to water in the state. General permits are authorized by §26.040 of the Texas Water Code.

PROPOSED GENERAL PERMIT. The Executive Director has prepared a draft renewal with amendments of an existing general permit that authorizes the discharge of waste from on-site treatment systems connected to certain single family residences located within the San Jacinto River Basin in Harris County. No significant degradation of high quality waters is expected and existing uses will be maintained and protected. The Executive Director proposes to require regulated dischargers to submit a Notice of Intent (NOI) to obtain authorization for discharge.

The Executive Director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) according to Coastal Coordination Council (CCC) regulations, and has determined that the action is consistent with applicable CMP goals and policies.

A copy of the proposed general permit and fact sheet are available for viewing and copying at the TCEQ's Office of the Chief Clerk, located at the TCEQ's Austin office at 12100 Park 35 Circle, Building F. These documents are also available at the TCEQ's sixteen (16) regional offices and on the TCEQ's website at http://www.tceq.state.tx.us/permitting/water_quality/wastewater/general/WQ_general_permits.html.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting about this proposed general permit. The purpose of a public meeting is to provide the opportunity to submit written or oral comment or to ask questions about the proposed general permit. Generally, the TCEQ will hold a public meeting if the executive director determines that there is a significant degree of public interest in the proposed general permit or if requested by a local legislator. A public meeting is not a contested case hearing.

Written public comments must be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 within 30 days from the date this notice is published in the *Texas Register.*

APPROVAL PROCESS. After the comment period, the Executive Director will consider all the public comments and prepare a written response. The response will be filed with the TCEQ Office of the Chief Clerk at least 10 days before the scheduled Commission meeting at which the commission will consider approval of the general permit. The commission will consider all public comment in making its decision and will either adopt the Executive Director's response or prepare its own response. The Commission will issue its written response on the general permit at the same time the Commission issues or denies the general permit. A copy of any issued general permit and response to comments will be made available to the public for inspection at the agency's Austin and regional offices. A notice of the Commissioner's action on the proposed general permit and a copy of its response to comments will be mailed to each person who made a comment. Also, a notice of the Commission's action on the proposed general permit and the text of its response to comments will be published in the *Texas Register.*

MAILING LISTS. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the Office of the Chief Clerk. You may request to be added to: (1) the mailing list for this specific general permit; (2) the permanent mailing list for a specific applicant name and permit number; and/or (3) the permanent mailing list for a specific county. Clearly specify the mailing lists to which you wish to be added and send your request to the TCEQ's Office of the Chief Clerk at the address above. Unless you otherwise specify, you will be included only on the mailing list for this specific general permit.

INFORMATION. If you need more information about this permit or the permitting process, please call the TCEQ's Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at: www.tceq.state.tx.us.

Further information may also be obtained by calling the TCEQ's Water Quality Division, Industrial Permits Team, at (512) 239-4671.

Si desea información en Español, puede llamar 1-800-687-4040.

TRD-200801166

LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 27, 2008

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## Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **April 7, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on April 7, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, §7.075 provides that comments on an AO shall be submitted to the commission in **writing**.

(1) COMPANY: J.W. Garrett & Son, Inc. dba G & G Enterprises; DOCKET NUMBER: 2007-1042-WQ-E; TCEQ ID NUMBER: RN105134498; LOCATION: 3050 Dowlen Road, Beaumont, Jefferson County, Texas; TYPE OF FACILITY: construction site; RULES VIOLATED: Texas Water Code (TWC), §26.121(a)(1), by failing to prevent the unauthorized discharge of storm water into waters in the state; and 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §126.22(a), by failing to develop and implement a storm water pollution prevention plan and by failing to sign and post a construction site notice for a small construction activity (less than five acres but greater than one acre of disturbed land); PENALTY: $4,200; STAFF ATTORNEY: Ben Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(2) COMPANY: Shahid Hameed dba RPS Discount; DOCKET NUMBER: 2006-1748-PST-E; TCEQ ID NUMBER: RN102061504; LOCATION: 1600 North Alexander Drive, Baytown, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month; and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs; PENALTY: $5,100; STAFF ATTORNEY: Becky Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200801150
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 26, 2008

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## Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **April 7, 2008**. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on April 7, 2008**. Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing**.

(1) COMPANY: A & L Partners, LLC dba Hurst Food Mart; DOCKET NUMBER: 2006-1844-PST-E; TCEQ ID NUMBER: RN101539930; LOCATION: 1401 West Hurst Boulevard, Hurst, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A), (2), (2)(A)(i)(III), and (d)(1)(B) and Texas Water Code (TWC), §26.3475(a) and (c)(1), by failing to monitor its underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), by failing to accurately conduct manual or automatic monthly inventory control procedure for all USTs, by failing to monitor the pressurized piping associated with the UST system in a manner designed to detect releases from any portion of the piping system, and by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §115.244(1) and (3) and Texas Health and Safety

Code (THSC), §382.085(b), by failing to properly conduct daily and monthly inspections of the Stage II vapor recovery system; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that a Stage II representative made aware to current employees the purpose and correct operating procedures for the Stage II Vapor Recovery System; 30 TAC §115.246(1) and (3) and THSC, §382.085(b), by failing to maintain all required Stage II records at the station and by failing to make the records immediately available for review upon request by agency personnel; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to conduct the required annual and triennial testing to verify proper operation of the Stage II equipment; 30 TAC §115.242(3)(J) and (9) and THSC, §382.085(b), by failing to maintain all components of the Stage II vapor recovery system in proper operating condition as specified by the manufacturer and/or any applicable California Air Resources Board executive order(s), and free of defects that would impair the effectiveness of the system; and 30 TAC §115.222(3) and §115.242(4) and THSC, §382.085(b), by failing to prevent the release of gasoline vapors from the Stage II vapor recovery system; PENALTY: $10,500; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Alonso Trejo; DOCKET NUMBER: 2007-1082-LII-E; TCEQ ID NUMBER: RN105236053; LOCATION: 8563 Dorbandt Circle, El Paso, El Paso County, Texas; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §30.5(a) and §344.4(a), TWC, §37.003, and Texas Occupations Code, §1903.251, by failing to hold a landscape irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing, or servicing an irrigation system or representing to the public that he could perform a service for which a license is required; and 30 TAC §344.58(b) and Texas Occupations Code, §1903.251, by failing to comply with irrigator installer requirements by the unauthorized use of a license of someone else who is a licensed irrigator; PENALTY: $875; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: El Paso Regional Office, 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(3) COMPANY: Anna Enterprises Inc. dba Charlies Food Mart 2; DOCKET NUMBER: 2006-1099-PST-E; TCEQ ID NUMBER: RN102256211; LOCATION: 23115 Aldine Westfield Road, Spring, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by the TCEQ investigator; 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as motor fuel; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once every month, not to exceed 35 days between each monitoring; and 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the UST system; PENALTY: $8,840; STAFF ATTORNEY: Mary Hammer, Litigation Division, MC 175, (512) 239-2496; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(4) COMPANY: Dennis Sparks; DOCKET NUMBER: 2006-2066-PST-E; TCEQ ID NUMBER: RN102271350; LOCATION: 13985 South Farm-to-Market 4, Santo, Palo Pinto County, Texas; TYPE OF FACILITY: non-operating convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to remove from service no later than 60 days after the prescribed upgrade implementation date, three USTs for which applicable components of the system were not brought into timely compliance with the upgrade requirements; and 30 TAC §334.22(a) and TWC, §5.702, by failing to pay outstanding UST fees for TCEQ Financial Account Number 0015196U for Fiscal Years 1990 - 2007; PENALTY: $7,875; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Douglas L. Barr dba Texas Rock; DOCKET NUMBER: 2007-1119-WQ-E; TCEQ ID NUMBER: RN103972691; LOCATION: 478 Limestone County Road 374, Groesbeck, Limestone County, Texas; TYPE OF FACILITY: surface mining operation; RULES VIOLATED: 30 TAC §281.25(a)(4), 40 Code of Federal Regulations (CFR) §122.26(c), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number TX05Q601, Part III, Section A(5)(i), by failing to provide records indicating that periodic inspections and quarterly visual monitoring of storm water discharges from each outfall were being conducted on a quarterly basis; and 30 TAC §281.25(a)(4), 40 CFR §122.26(c), and TPDES Permit Number TX05Q601, Part III, Section A(7)(c)(4) and Section D(1)(d), by failing to include a report containing the results of the annual site compliance investigation as part of the storm water pollution prevention plan or referenced in the storm water pollution prevention plan and record results for each annual monitoring period on a discharge monitoring report to be made readily available for inspection and review, upon request by TCEQ personnel; PENALTY: $6,300; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(6) COMPANY: Heroes Quick Stop, Inc. dba Wez Mart 2; DOCKET NUMBER: 2006-1817-PST-E; TCEQ ID NUMBER: RN102050994; LOCATION: 930 East Formosa Boulevard, San Antonio, Bexar County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.49(c)(2)(C) and TWC, §26.3475(d), by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly; 30 TAC §334.50(a)(1)(A) and TWC, §26.3475(c)(1), by failing to provide a method, or combination of methods, of release detection which shall be capable of detecting a release from any portion of the UST system which contains regulated substances, including the tanks, piping, and other underground ancillary equipment; 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the UST system in a manner which will detect a release at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.50(b)(2)(A)(i)(III) and TWC, §26.3475(a), by failing to test the line leak detector at least once per year for performance and operation reliability; 30 TAC §334.50(b)(2)(A)(ii)(I) and TWC, §26.3475(a), by failing to test the piping at least once per year by means of a piping tightness test that is capable of detecting any release from the piping system of 0.1 gallons per hour when the piping pressure is 150% of normal operating pressure; 30 TAC §334.10(b) and TCEQ Agreed Order Docket Number 2005-1046-PST-E, Ordering Provision Number 2.b.i., by failing to provide adequate corrosion protection records and inventory control records; 30 TAC §334.8(c)(4)(B), by failing to renew the facility's delivery certificate by timely and proper submission of a new UST registration and self-certification form to the agency; 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs at the facility; 30 TAC §334.8(c)(5)(C) and TCEQ Agreed Order Docket Number 2005-1046-PST-E, Ordering Provision Number 2.b.ii., by failing to ensure that a legible tag, label, or marking with the tank number was permanently applied upon or affixed to either the top of the fill tube or to a nonremovable point in

the immediate area of the fill tube according to the UST registration and self-certification form; 30 TAC §334.7(d)(3), by failing to amend, update, or change information on the facility's UST registration; and 30 TAC §334.72(2), by failing to report to the commission, within 24 hours, unusual operating conditions of the UST system observed by owners or operators; PENALTY: $30,400; STAFF ATTORNEY: Patrick Jackson, Litigation Division, MC 175, (512) 239-6501; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(7) COMPANY: James Carter; DOCKET NUMBER: 2007-1596-PST-E; TCEQ ID NUMBER: RN103141180; LOCATION: on the southwest corner of Highway 77 and Dunaway Street, Italy, Ellis County, Texas; TYPE OF FACILITY: former gasoline service station; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, three USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; 30 TAC §334.7(d)(3), by failing to notify the TCEQ of any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition, as applicable; and 30 TAC §334.48(a), by failing to prevent an unauthorized discharge of motor oil; PENALTY: $11,550; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Mohammed Sadiq Ali dba Dry Clean Super Station; DOCKET NUMBER: 2006-1333-DCL-E; TCEQ ID NUMBER: RN104160924; LOCATION: 680 North Denton Tap Road, Suite 100, Coppell, Dallas County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULES VIOLATED: 30 TAC §337.10(a) and THSC, §374.102(a), by failing to complete and submit the required registration form to the TCEQ for a dry cleaning and/or drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Mary Hammer, Litigation Division, MC 175, (512) 239-2496; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: Roberto Negrete dba Fina Mart No. 18; DOCKET NUMBER: 2004-0386-AIR-E; TCEQ ID NUMBER: RN103058566; LOCATION: 7710 South Loop 12, Dallas, Dallas County, Texas; TYPE OF FACILITY: official vehicle inspection station; RULES VIOLATED: 30 TAC §114.50(d)(2) and THSC, §382.085(b), by failing to comply with emissions certificate regulations by issuing a Safety/Emissions certificate without performing the emissions test; PENALTY: $1,250; STAFF ATTORNEY: Anna Cox, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Vicky Barnett dba Vicky's Playcare; DOCKET NUMBER: 2007-0803-PWS-E; TCEQ ID NUMBER: RN105027924; LOCATION: 205 County Road 4111, Cass County, Texas; TYPE OF FACILITY: day care center with public water supply (PWS); RULES VIOLATED: 30 TAC §290.41(c)(3)(N), by failing to provide a flow measuring device to measure production yields and provide for the accumulation of water production data; 30 TAC §290.42(b)(1), by failing to provide disinfection facilities for microbiological control and distribution protection; 30 TAC §290.42(1), by failing to compile and maintain a facility operations manual for operator review and reference; 30 TAC §290.43(d)(2), by failing to provide the pressure tank with a pressure release device and an easily readable gauge; 30 TAC §290.46(f)(2), by failing to provide water system records to commission personnel at the time of the investigation; 30 TAC §290.46(m)(1), by failing to conduct an annual inspection of the water system's pressure tank; 30 TAC §290.121(a) and (b), by failing to maintain an up-to-date chemical and microbiological monitoring plan that identifies all sampling locations, describes the sampling frequency, and specifies the analytical procedures and laboratories that the PWS will use to comply with the monitoring requirements; 30 TAC §290.46(a) and THSC, §341.035(a), by failing to submit plans to the executive director for review and approval prior to the construction of a PWS; 30 TAC §290.46(e) and THSC, §341.033(a), by failing to ensure that the production, treatment, and distribution facilities at the PWS are under the direct supervision of a water works operator who holds an applicable and valid license; 30 TAC §290.45(d)(2)(A)(ii) and THSC, §341.0315(c), by failing to provide a minimum pressure tank capacity of 220 gallons, 30 TAC §290.46(r), by failing to operate the system to maintain a minimum pressure of 35 pounds per square inch throughout the distribution system under normal operating conditions; and 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to perform routine monthly bacteriological sampling of the PWS during the months of August 2006, October 2006, December 2006, and January - August 2007 and by failing to provide notification of the failure to conduct monthly bacteriological sampling during the months of August 2006, October 2006, January - August 2007; PENALTY: $9,067; STAFF ATTORNEY: Ben Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(11) COMPANY: William Carl Bell dba Speedos; DOCKET NUMBER: 2006-1781-PST-E; TCEQ ID NUMBER: RN102042280; LOCATION: 1018 East United States Highway 175, Crandall, Kaufman County, Texas; TYPE OF FACILITY: property with four USTs; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, an existing UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; 30 TAC §334.7(d)(3), by failing to provide an amended UST registration to the commission for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition; and 30 TAC §334.54(b) and (d)(2), by failing to ensure that any residue from stored regulated substances which remains in the temporarily out-of-service UST system did not exceed a depth of 2.5 centimeters at the deepest point and by failing to maintain all piping, pumps, manways, tank access points, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons; PENALTY: $22,050; STAFF ATTORNEY: Kari Gilbreth, Litigation Division, MC 175, (512) 239-1320; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200801151
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 26, 2008

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## Notice of Water Quality Applications

The following notices were issued during the period of February 14, 2008 through February 26, 2008.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN

30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

CALDWELL 405 LP has applied for a renewal of TPDES Permit No. WQ0014439001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 700,000 gallons per day. The facility will be located approximately 7,000 feet southwest of the intersection of State Highway 21 and Farm-to-Market Road 2720 in northwest Caldwell County, Texas.

CITY OF BORGER has applied for a renewal of TPDES Permit No. WQ0010535001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,000,000 gallons per day. The facility is located at 1302 West Third Street in the City of Borger in Hutchinson County, Texas.

CITY OF MERCEDES has applied for a major amendment to TPDES Permit No. WQ0010347001 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 2,300,000 gallons per day to an annual average flow not to exceed 5,000,000 gallons per day. The facility is located at 1501 East Mile 8 North, on both sides of and adjacent to Mile 1/2 East Road immediately south of its intersection with North 8 Mile Road in Hidalgo County, Texas.

CITY OF PANORAMA VILLAGE has applied for a renewal of TPDES Permit No. WQ0011097001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 400,000 gallons per day. The draft permit also authorizes the disposal of treated domestic wastewater, via irrigation, at a daily average flow not to exceed 0.05 million gallons per day on 188 acres of Panorama Country Club Golf Course. The facility is located on the north side of League Line Road approximately 3/4 mile west of Interstate Highway 45 in Montgomery County, Texas.

FLAGSHIP EMERALD POINT LP has applied for a renewal of Permit No. WQ0013825001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day via low pressure dosed subsurface drainfield with a minimum area of 31,250 square feet. The wastewater treatment facility and disposal site are located at 5973 Hiline Road, on the west side of Hiline Road off of Hudson Bend Road approximately 1/4 mile north-northwest of the intersection of R.M. 620 and Hudson Bend Road in Travis County, Texas.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT 151 has applied for a renewal of TPDES Permit No. WQ0014528001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 900,000 gallons per day. The facility is located about 2 miles west and 1.1 miles south of the intersection of Interstate Highway 10 and Farm-to-Market Road 1463 in Fort Bend County, Texas.

FPLE FORNEY LP 13770 West U.S. Highway 80, Forney, Texas 75126, which operates the Forney Power Project, a combined cycle power generating plant, has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to TPDES Permit No. WQ0004359000 to authorize an increase in the discharge of cooling tower blowdown and previously monitored effluent (PME) from a daily average flow not to exceed 4,000,000 gallons per day to 4,500,000 gallons per day via Outfall 001, and an increase in the total dissolved solids (TDS) effluent limitations from a daily average not to exceed 70,437 lb/day to 187,650 lb/day, and the daily maximum from 149,016 lb/day to 396,991 lb/day to allow the power plant to remain in operation under drought conditions in the area. The current permit authorizes the discharge of cooling tower blowdown and previously monitored effluent (PME) at a daily average flow not to exceed 4,000,000 gallons per day via Outfall 001, low volume waste including reverse osmosis (RO) reject water on a flow variable basis via Outfall 101, and low volume waste including Heat Recovery Stem Generator (HRSG) blowdown on a flow variable basis via Outfall 201. Due to recent drought conditions, the implications of water reuse projects in the area and the import of higher TDS waters into the basin, applicant requests a temporary variance to the water quality standards in order to allow TCEQ staff to reevaluate the current TDS, chloride, and sulfate criteria listed in Appendix A of the 2000 Texas Surface Water Quality Standards for the East Fork Trinity River, Lake Lavon, and Lake Ray Hubbard. TCEQ staff are currently evaluating water bodies in North Central Texas with regard to the impacts of water reuse and rerouting, and TCEQ staff recommend that this variance be granted in order to allow further consideration of this issue. If scientific evidence indicates revised criterias are warranted, these criteria will be proposed in the next revision of the Texas Surface Water Quality Standards. The variance would authorize a three-year period in which to conduct a water quality study of the East Trinity River into which the wastewater is discharged. The study would show whether a site-specific amendment to water quality standards is justified. Prior to the expiration of the three-year variance period, the Commission will consider the site-specific standards and determine whether to adopt the standards or require the existing water quality standards to remain in effect. This application was submitted to the TCEQ on May 21, 2007.

GREEN EARTH PROCESSING LLC which operates Gereke Chemicals, Inc. WWTP, has applied for a renewal of TPDES Permit No. WQ0003889000, which authorizes the discharge of storm water from process containment pads on an intermittent and flow-variable basis via Outfall 001; discharge of non-process area storm water on an intermittent and flow-variable basis via Outfall 002. The facility is located at 1050 Jefferson Road, approximately two miles north of the intersection of State Highway 225 and Bearle Street at the Houston Ship Channel/Buffalo Bayou Tidal terminus of Jefferson Road, in the City of Pasadena, Harris County, Texas.

MARHABA PARTNERS LIMITED PARTNERSHIP has applied for a new permit, proposed TPDES Permit No. WQ0014739001, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 1,012,000 gallons per day. The facility will be located 3,750 feet east of the intersection of Interstate Highway 10 and Farm-to-Market Road 359 and 4,735 feet south of the Interstate Highway 10 adjacent to the east bank of Brookshire Creek in Waller County, Texas.

NORTHAMPTON MUNICIPAL UTILITY DISTRICT has applied for a major amendment to TPDES Permit No. WQ0010910001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 750,000 gallons per day to an annual average flow not to exceed 1,150,000 gallons per day and to remove effluent limitations and monitoring requirements for silver. The facility is located at 24235 Gosling Road, on the north bank of Willow Creek approximately 1,200 feet upstream of the Gosling Road crossing of the Willow Creek in Harris County, Texas.

SIENNA PLANTATION MUNICIPAL UTILITY DISTRICT No. 1 has applied for a major amendment to TPDES Permit No. WQ0014612001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 600,000 gallons per day to an annual average flow not to exceed 3,500,000 gallons per day. The facility is located approximately 500 feet south of Sienna Parkway, 465 feet east of Channel 2 and west of the pipeline easement in Fort Bend County, Texas.

SPRING OAKS MOBILE HOME PARK INC has applied for a renewal of TPDES Permit No. WQ0012650001, which authorizes the

discharge of treated domestic wastewater at a daily average flow not to exceed 25,000 gallons per day. The facility is located at 4330 Pin Oak Lane, on the north side of Spring-Steubner Road, approximately 2.5 miles west of the intersection of Interstate Highway 45 and Spring-Steubner Road in Harris County, Texas.

TEXAS AMERICAN WATER COMPANY has applied for a renewal of TPDES Permit No. WQ0010694001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility is located on the east side of Sellers Road, approximately 700 feet north of the intersection of Hollyvale and Sellers Road in Harris County, Texas.

THE CITY OF JEWETT has applied for a renewal of TPDES Permit No. WQ0011392001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day. The facility is located at 925 North Sugar Street, approximately 500 feet southeast of Sugar Street, approximately 4,000 feet east of State Highway 79, on the east side of the City of Jewett in Leon County, Texas.

VOPAK RAILCAR HOCKLEY LLC which operates a railcar cleaning facility, has applied for a renewal of TPDES Permit No.WQ0003627000, which authorizes discharge of storm water on an intermittent and variable basis via Outfall 001. The facility is located at 17020 Premium Drive, within the City of Hockley, Harris County, Texas.

WOODLOCH MHP LLC has applied for a renewal of TPDES Permit No. WQ0011673001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility is located approximately 0.75 miles south-southeast of the intersection of Hardy Road and Aldine Mail Road and approximately 1 mile north of the intersection of Hardy Road and Hopper Road in Harris County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200801164
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 27, 2008

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### Notice of Water Rights Application

Notice issued February 8, 2008

REVISED APPLICATION NO. 12213; CB&I Constructors, Inc., Applicant, 3752 South Gulfway Drive, P.O. Box 440, Sabine Pass, TX 77655, has applied for a temporary water use permit to divert and use not to exceed 420 acre-feet of water from the Port Arthur Ship Canal, Neches-Trinity Coastal Basin, within a period of two years and nine months for industrial purposes in Jefferson County. More information on the application and how to participate in the permitting process is given below. Notice of this application was mailed to the downstream water right holders of record in the Neches-Trinity Coastal Basin on October 24, 2007. The comment period ended on November 13, 2007. On January 2, 2008, the applicant amended their application to increase the requested diversion rate to 15.37 cfs (6,900 gpm). As a result of the change in the application, the revised notice will be mailed to the downstream water right holders of record in the Neches-Trinity Coastal Basin. The application and fees were received on May 30, 2007, and additional information and fees were received on August 6, 2007, August 17, 2007, and January 2, 2008. The application was declared administratively complete and filed with the Office of the Chief Clerk on August 30, 2007. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, by February 29, 2008.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "I/we request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200801165
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 27, 2008

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## Texas Facilities Commission

### Request for Proposals #303-8-11159

The Texas Facilities Commission (TFC), on behalf of the Department of Family and Protective Services (DFPS), announces the issuance of Request for Proposals (RFP) #303-8-11159. TFC seeks a 10 year lease of approximately 12,230 square feet of office space in Northeast Tarrant County, Texas.

The deadline for questions is March 14, 2008 and the deadline for proposals is March 21, 2008 at 3:00 p.m. The award date is April 18, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor

the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=75343*.

TRD-200801159
Kay Molina
General Counsel
Texas Facilities Commission
Filed: February 27, 2008

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## Texas Health and Human Services Commission

### Public Notice

The Texas Health and Human Services Commission announces its intent to submit Amendment 800, Transmittal Number TX 07-041, to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act. The proposed amendment is effective April 1, 2008.

The proposed amendment is an administrative reorganization of three previously approved State Plan Amendments into one.

1) Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) would be removed from Home Health in the State Plan;

2) Hearing devices would be separated from Hearing Services;

3) Vision devices would be separated from Vision Services.

DMEPOS, hearing devices, and vision devices would be merged into one new State Plan amendment.

In addition, the amendment limits payment amounts for these services to equal or less than the Medicare allowance as directed by the Federal OIG.

This proposed amendment has no fiscal impact.

To obtain copies of the proposed amendment or to submit written comments, interested parties may contact Jim Hollinger, Rate Analyst, Rate Analysis Department, by mail at the Texas Health and Human Services Commission, P.O. Box 85200, H-400, Austin, Texas 78708-5200; by telephone at (512) 491-1175; by facsimile at (512) 491-1998; or by e-mail at james.hollinger@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Department of Aging and Disability Services.

TRD-200801163
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: February 27, 2008

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## Texas Department of Insurance

### Company Licensing

Application to change the name of ELDER HEALTH TEXAS, INC. D/B/A BRAVO HEALTH TEXAS, INC. to BRAVO HEALTH TEXAS, INC. a domestic health maintenance organization. The home office is in San Antonio, Texas.

Application to change the name of GERLING AMERICA INSURANCE COMPANY to HDI-GERLING AMERICA INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Chicago, Illinois.

Any objections must be filed with the Texas Department of Insurance, within 20 calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200801169
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: February 27, 2008

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## Texas Lottery Commission

### Instant Game Number 1034 "Winning in 3's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1034 is "WINNING IN 3'S". The play style for GAME 1 is "key number match with tripler". The play style for GAME 2 is "match 3 of 9 with tripler". The play style for GAME 3 is "match 3 of 6 with tripler".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1034 shall be $3.00 per ticket.

1.2 Definitions in Instant Game No. 1034.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 4, 5, 6, 7, 8, 9, 3X SYMBOL, $3.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000, $3,000, $33,333, STACK OF COINS SYMBOL, DOLLAR BILL SYMBOL, PIGGY BANK SYMBOL, HORSESHOE SYMBOL, POT OF GOLD SYMBOL, CLOVER SYMBOL, GOLD BAR SYMBOL, MONEY BAG SYMBOL, and the GOLD NUGGET SYMBOL.

D. Play Symbol Caption - the printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1034 - 1.2D

| PLAY SYMBOL | CAPTION |
|---|---|
| 1 | ONE |
| 2 | TWO |
| 4 | FOR |
| 5 | FIV |
| 6 | SIX |
| 7 | SVN |
| 8 | EGT |
| 9 | NIN |
| 3X SYMBOL | TRIPLE |
| $3.00 | THREE$ |
| $4.00 | FOUR$ |
| $5.00 | FIVE$ |
| $10.00 | TEN$ |
| $20.00 | TWENTY |
| $50.00 | FIFTY |
| $100 | ONE HUND |
| $1,000 | ONE THOU |
| $3,000 | THR THOU |
| $33,333 | 33 TH333 |
| STACK OF COINS SYMBOL | COINS |
| DOLLAR BILL SYMBOL | DOLLAR |
| PIGGY BANK SYMBOL | PIGBNK |
| HORSESHOE SYMBOL | SHOE |
| POT OF GOLD SYMBOL | GOLD |
| CLOVER SYMBOL | CLOVER |
| GOLD BAR SYMBOL | BAR |
| MONEY BAG SYMBOL | BAG |
| GOLD NUGGET SYMBOL | NUGGET |

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 1034 - 1.2E

| CODE | PRIZE |
|---|---|
| THR | $3.00 |
| FOR | $4.00 |
| SVN | $7.00 |
| NIN | $9.00 |
| TEN | $10.00 |
| FTN | $15.00 |
| TWN | $20.00 |

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

G. Low-Tier Prize - A prize of $3.00, $4.00, $7.00, $9.00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize - A prize of $50.00 or $100.

I. High-Tier Prize - A prize of $1,000, $3,000 or $33,333.

J. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1034), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 125 within each pack. The format will be: 1034-0000001-001.

L. Pack - A pack of "WINNING IN 3'S" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of ticket 001 and the back of ticket 125. Configuration B will show the back of ticket 001 and the front of ticket 125.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "WINNING IN 3'S" Instant Game No. 1034 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "WINNING IN 3'S" Instant Game is determined once the latex on the ticket is scratched off to expose 27 (twenty-seven) Play Symbols. In GAME 1, if a player matches any of YOUR NUMBERS play symbols to the WINNING NUMBER play symbol, the player wins PRIZE shown for that number. If a player reveals a "3X" play symbol, the player wins TRIPLE the PRIZE shown. In GAME 2, if a player reveals 3 matching symbols, the player wins PRIZE shown. If a player reveals 2 matching symbols and a "3X" play symbol, the player wins TRIPLE the PRIZE shown. In GAME 3, if a player reveals 3 matching amounts, the player wins that amount. If a player reveals 2 matching amounts and a "3X" play symbol, the player wins TRIPLE that amount. "No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 27 (twenty-seven) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 27 (twenty-seven) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 27 (twenty-seven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures.

17. Each of the 27 (twenty-seven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another un-

played ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The "3X" (tripler) play symbol will only appear on intended winning tickets as dictated by the prize structure.

C. Although not all prize symbols can be won in each game, they may appear in all possible prize locations as a non-winning symbol.

D. GAME 1. No duplicate non-winning YOUR NUMBERS play symbols.

E. GAME 1. No duplicate non-winning prize symbols.

F. GAME 1: There will be no correlation between the YOUR NUMBERS play symbols and the PRIZE symbols on a ticket.

G. GAME 2: No four or more matching play symbols.

H. GAME 2: No 3 or more matching play symbols when the "3X" (tripler) play symbol appears in the game.

I. GAME 2: No 2 or more pairs of matching play symbols when the "3X" (tripler) play symbol appears in the game.

J. GAME 2: No three or more pairs of matching play symbols.

K. GAME 3: No 4 or more matching amounts.

L. GAME 3: No 3 or more matching play symbols when the "3X" (tripler) play symbol appears in the game.

M. GAME 3: No 2 or more pairs of matching play symbols when the "3X" (tripler) play symbol appears in the game.

N. GAME 3: No three or more pairs of matching play symbols.

2.3 Procedure for Claiming Prizes.

A. To claim a "WINNING IN 3'S" Instant Game prize of $3.00, $4.00, $7.00, $9.00, $10.00, $15.00, $20.00, $50.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "WINNING IN 3'S" Instant Game prize of $1,000, $3,000 or $33,333, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "WINNING IN 3'S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General; or

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "WINNING IN 3'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "WINNING IN 3'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available

in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1034. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 1034 - 4.0

| Prize Amount | Approximate Number of Winners* | Approximate Odds are 1 in** |
|---|---|---|
| $3 | 725,760 | 6.94 |
| $4 | 141,120 | 35.71 |
| $7 | 80,640 | 62.50 |
| $9 | 80,640 | 62.50 |
| $10 | 60,480 | 83.33 |
| $15 | 80,640 | 62.50 |
| $20 | 60,480 | 83.33 |
| $50 | 39,900 | 126.32 |
| $100 | 5,334 | 944.88 |
| $1,000 | 168 | 30,000.00 |
| $3,000 | 9 | 560,000.00 |
| $33,333 | 6 | 840,000.00 |

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.95. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1034 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1034, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200801170
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 27, 2008

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Notice of Public Hearing

A public hearing to receive public comments regarding the proposed new 16 TAC §402.210, relating to House Rules will be held on Thursday, March 20, 2008, at 10:00 a.m. at the Texas Lottery Commission, Commission Auditorium, First Floor, 611 E. Sixth Street, Austin, Texas 78701. Persons requiring any accommodation for a disability should notify Michelle Guerrero, Executive Assistant to the General Counsel, Texas Lottery Commission at (512) 344-5113 at least 72 hours prior to the public hearing.

TRD-200801071
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 22, 2008

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## Public Utility Commission of Texas

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On February 20, 2008, Telrite Corporation filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60737. Applicant intends to reflect a change in type of provider to facilities-based and resale telecommunications services.

The Application: Application of Telrite Corporation for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 35390.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 12, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35390.

TRD-200801097
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 22, 2008

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## Notice of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on February 13, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Grande Communications Networks, Inc. to Amend a State-Issued Certificate of Franchise Authority, Project Number 35366 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the Wimberley Apartments located at 4141 Horizon North Parkway, Dallas, TX 75287, consisting of a 29 acre, developed rectangular lot at the extreme northernmost location in the City of Dallas as shown highlighted in orange on the map attached to the application, bounded on the north by the KCS Railroad tracks, bounded on the south by Horizon North Parkway, and bounded on the west by Midway Road.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35366.

TRD-200801066
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 21, 2008

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## Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on February 19, 2008, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Voicepaq Prepaid, LLC for a Service Provider Certificate of Operating Authority, Docket Number 35385 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service and long distance services.

Applicant's requested SPCOA geographic area includes the area of Texas served by Southwestern Bell Telephone Company d/b/a AT&T Texas, and Verizon Southwest.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 12, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35385.

TRD-200801064
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 21, 2008

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## Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application on February 20, 2008, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of New Horizons Communications Corp. d/b/a NHC Corporation for a Service Provider Certificate of Operating Authority, Docket Number 35391 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, HDSL, SDSL, RADSL, VDSL, Optical Services, T1-Private Line, Switch 56 KBPS, Frame Relay, Fractional T1, long distance, and wireless service.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 12, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35391.

TRD-200801098
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 22, 2008

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## Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On February 19, 2008, USCom Telephone, Inc. filed an application with the Public Utility Commission of Texas (commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60244. Applicant intends to relinquish its certificate.

The Application: Application of USCom Telephone, Inc. to Relinquish its Service Provider Certificate of Operating Authority, Docket Number 35383.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than March 12, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35383.

TRD-200801063
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 21, 2008

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### Public Notice of Workshop - Rulemaking Relating to Net Metering and Interconnection of Distributed Renewable Generation

The staff of the Public Utility Commission of Texas (commission) will hold a workshop to hear comments from market participants on strawman language, on Tuesday, March 18, 2008, at 9:00 a.m. in the Commissioners' Hearing Room, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 34890, *PUC Rulemaking Relating to Net Metering and Interconnection of Distributed Generation* has been established for this proceeding. In this workshop, commission staff seeks input from market participants in preparation for proposed rulemaking in this project. This notice is not a formal notice of proposed rulemaking, however, the parties' responses to the questions and comments at the workshop will assist the commission in developing a commission policy or determining the necessity for a related rulemaking.

The commission requests that persons wishing to make presentations at the workshop register by phone with David Smithson at (512) 936-7156 or by e-mail at david.smithson@puc.state.tx.us.

Questions concerning the workshop or this notice should be referred to David Smithson at (512) 936-7156. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200801142
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 26, 2008

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### Request for Proposals for a Study Regarding Cost Effective Energy Efficiency in Texas

The Public Utility Commission of Texas (PUCT) is issuing a Request for Proposals (RFP) for a study regarding energy efficiency in Texas. The contract awardee will study the potential for cost-effective energy efficiency in Texas and provide a report of its findings, with recommendations for changes in existing energy efficiency programs. The Statement of Work (available on http://www.puc.state.tx.us/about/procurement/currentrfps.cfm) included in the proposal contains detailed information concerning the requirements for the study. The closing date and time for receipt of proposals is 5:00 p.m. on Tuesday, March 25, 2008.

The PUCT administers an energy efficiency program under Public Utility Regulatory Act (PURA) §39.905 designed to improve utility customers' energy use and meet a statutory goal for energy efficiency. This program is operated by the electric utilities and funded through rates. Legislation was enacted in 2007 amending PURA §39.905 to modify the energy efficiency program in several respects, including increasing the savings goals to 15% of each electric utility's annual growth in demand in 2008 and 20% of each electric utility's annual growth in demand in 2009. The 2007 legislation directed the PUCT to conduct a study of the potential for cost-effective energy efficiency in Texas; specific objectives of this study were to determine whether the existing goals for the energy efficiency program could be raised to 30% of each electric utility's annual growth in demand by 2010 and 50% of growth in demand by 2015.

The study shall evaluate the potential for cost-effective energy efficiency in Texas. Generally, the study shall provide information on the technical, economic, and achievable potential, and natural occurrence of energy efficiency in the service areas of investor-owned utilities in Texas (in kilowatts and kilowatt hours) and estimates of achievable savings. Based on the findings concerning the potential for energy efficiency and its costs, the study shall provide policy recommendations on issues related to funding energy efficiency programs. Based on the findings concerning the potential for energy efficiency and its costs, the PUCT may request that the Contractor quantify the reductions in air emissions from electric generating plants that would result from the implementation of some of the energy efficiency programs administered by the PUCT for the period 2009 - 2014. Based on the findings concerning the potential for energy efficiency and its costs, the PUCT may request that the Contractor share the results of its study with a third party that would quantify the reductions in air emissions from electric generating plants that would result from the implementation of some of the energy efficiency programs administered by the PUCT for the period 2009 - 2014.

RFP documentation may be obtained by contacting Cindy Wilson, Purchaser, cindy.wilson@puc.state.tx.us, Public Utility Commission of Texas, P.O. Box 13326, Austin, TX 78711-3326, (512) 936-7069.

RFP documentation also is located on the PUCT website at http://www.puc.state.tx.us/about/procurement/currentrfps.cfm.

TRD-200801141
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 26, 2008

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## The Texas A&M University System

### Notice of Sale of Oil, Gas and Sulphur Lease

The Board of Regents of The Texas A&M University System, pursuant to provisions of V.T.C.A., Education Code, Chapter 85, as amended, and subject to all policies and regulations promulgated by the Board of Regents, offers for sale at public auction in Suite 2079, System Real Estate Office, The Texas A&M University System, A&M System Building, 200 Technology Way, College Station, Texas, at 10:00 a.m., Wednesday, April 2, 2008, an oil, gas and sulphur lease on the following described land in Victoria County, Texas. The property of-

fered for lease contains 205.03 mineral acres, more or less, and more particularly described as follows:

205.03 acres of land, more or less out of the T&NO RR Co. Survey, Section No. 5, Block No. 3, Abstract No. 357, Patent No. 575, Volume 26, dated January 17, 1878 and out of the Day Land & Cattle Co. Survey, Abstract No. 509, Patent No. 160, Volume 8, dated September 12, 1894 Victoria County, Texas, said 205.03 acres also being parts of Farm Lots 99, 100, 102, 103, 121 and 194 of W. A. Woods Subdivision as shown by plat of record in Volume 35, Page 1, Deed Records of Victoria County, Texas.

The minimum lease terms, which apply to this tract, are as follows:

(1) Bonus: Market rate, but in no event will it be less than $250 per net mineral acre

(2) Royalty: 25%

(3) Primary term: Three (3) years

(4) Net Mineral Acres: 205.03 (More or Less)

Highest bidder shall pay to the Board of Regents on the day of the sale 25% of the bonus bid, and the balance of the bid shall be paid to the Board within twenty-four (24) hours after notification that the bid has been accepted. All payments shall be by cash, certified check or cashier's check as the Board may direct. Failure to pay the balance of the amount bid will result in forfeiture to the Board of the 25% paid. The Board of Regents of The Texas A&M University System **RESERVES THE RIGHT TO REJECT ANY AND ALL BIDS** . The successful bidder will be required to pay all advertising expenses and administrative costs.

Further inquiries concerning oil, gas and sulphur leases on System land should be directed to:

Melody Meyer

System Real Estate Office

The Texas A&M University System

200 Technology Way, Suite 2079

College Station, Texas 77845-3424

Telephone: (979) 458-6350

TRD-200801067
Vickie Burt Spillers
Executive Secetary to the Board
The Texas A&M University System
Filed: February 22, 2008

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## Texas Department of Transportation

### Cancellation of SH 122 Environmental Impact Statement

In the September 13, 2002, issue of the *Texas Register* (27 TexReg 8824) the department issued a Notice of Intent--SH 122 Segment B EIS notifying the public that an Environmental Impact Statement (EIS) would be prepared for the proposed construction of SH 122 (Fort Bend Parkway) from SH 6 to SH 99 in Fort Bend County. The project is now cancelled; therefore, no further project activities will occur.

**Agency Contact:** Comments or concerns regarding this action should be sent to Dianna F. Noble, P.E., Texas Department of Transportation, Environmental Affairs Division, 125 East 11th Street, Austin, Texas 78701, telephone (512) 416-2734.

TRD-200801144
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: February 26, 2008

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### Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and 43 Texas Administrative Code §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site:

**www.txdot.gov/about_us/public_hearings_and_meetings/aviation.htm**

Or visit **www.txdot.gov**, click on Citizen, click on Public Hearings, and then click on Aviation.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 1-800-68-PILOT.

TRD-200801143
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: February 26, 2008

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## The University of Texas System

### Invitation for Consultants to Provide Offers of Consulting Services

Invitation No. RTT20080325

The University of Texas System (University) and Texas A&M University System (TAMUS) strongly support advancing Texas' ability to research, develop, and commercialize nanotechnology. University and TAMUS are working together to advance and target nanotechnology research areas including nanoelectronics, nanomaterials, nanostructures, and nanomedicine. University and TAMUS are beginning exploratory work to evaluate the feasibility of creating the Texas Alliance for Nanotechnology (TxAN), a new State of Texas university-industry laboratory for nanotechnology research and development. The key objective of the TxAN concept is to link leading Texas nanotech research laboratories, superior talent, and nano-fabrication facilities into a powerful research and development and commercialization network. TxAN goals may include:

* An upgrade of the nanotechnology-related infrastructure and equipment available to Texas researchers to state-of-the-art status

* Shared access to facilities among universities, large and small companies, and consortia

* Improved proof-of-concept and prototyping capabilities for commercialization of early stage intellectual property (IP)

* Streamlined IP and equipment access policies among participants

* Increased opportunities for university students and researchers to engage with industry

* Comprehensive nanotechnology workforce training

* Increased collaboration with federal agency labs to attract more federal funds to Texas

University and TAMUS Boards of Regents passed resolutions forming a Coordinating Committee (Committee) comprised of four University appointees and four TAMUS appointees. In order to evaluate the feasibility of developing a state laboratory in the area of nanotechnology, it will be necessary for University to hire a consultant to perform the scope of work described in this invitation (Invitation). As required by the provisions of *Texas Government Code*, Chapter 2254, prior to awarding a contract for consulting services, University extends this Invitation to qualified and experienced consultants interested in providing the consulting services described in this Invitation to University.

Scope of Work:

The successful consultant will perform the following services for Committee:

(1) Provide project management to assist the Committee with preparation of a development plan (Plan) to establish a state nanotechnology laboratory (including but not limited to details such as research area, necessary equipment and facilities, potential funding sources, initiatives in other states and those that are on-going in the State of Texas, and prospective university and industry participants). This activity could include preparation of background information and documentation for Committee.

(2) When appropriate for implementation of the Plan, develop and administer timelines for development of the Plan and provide supporting activities such as development of working documents including but not limited to proposed Letters of Intent (LOI), Requests for Information (RFI) and Requests for Proposal (RFP), as directed by Committee.

(3) Develop consensus among multiple stakeholders at the state, regional and federal levels regarding need for a State of Texas university-industry nanotechnology lab.

(4) Work to bring external expert perspective, as directed by Committee.

(5) Interface with federal and state government, private industry, and proposing communities, as directed by Committee.

(6) Provide expert advice and assist the Committee with the evaluation of the costs and benefits of the TxAN concept developed by the Committee and the costs and benefits of preparing and executing a Request for Proposal for government and industry partners in the TxAN initiative.

(7) Provide expert advice with regard to potential economic development comparables and the impact of TxAN on communities.

(8) Other tasks relevant to the effort as directed by Committee from time to time.

(9) This effort does not include basic administrative support for scheduling individuals, general meeting support, or recording of minutes which will be provided by Committee.

Specifications:

Any consultant submitting an offer in response to this Invitation must provide the following:

(1) consultant's legal name, including type of entity (individual, partnership, corporation, etc.), and address;

(2) background information regarding the consultant, including the number of years in business and the number of employees;

(3) information regarding the qualifications, education, and experience of the team members proposed to conduct the requested services;

(4) the hourly rate to be charged for each team member providing services;

(5) the earliest date by which the consultant could begin providing the services;

(6) a list of five (5) client references, including any complex institutions or systems of higher education for which consultant has provided consulting services;

(7) a statement of consultant's approach to the project (i.e., the services described in the Scope of Work section of this Invitation), any unique benefits consultant offers University, and any other information consultant desires University to consider in connection with consultant's offer;

(8) information to assist University in assessing consultant's demonstrated competence and experience providing consulting services similar to the services requested in this Invitation;

(9) information to assist University in assessing the consultant's knowledge of the nanotechnology field;

(10) information to assist University in assessing the consultant's awareness of emerging issues in nanotechnology and our State's competitiveness in this field;

(11) information to assist University in assessing the consultant's experience performing the requested services for other complex institutions or systems of higher education;

(12) information to assist University in assessing whether the consultant will be impartial in the performance of the requested services;

(13) information to assist University in assessing whether the consultant will have any conflicts of interest in performing the requested services;

(14) information to assist University in assessing the overall cost to University for the requested services to be performed;

(15) information regarding any prompt payment discount offered by consultant (University's standard payment terms for services are "Net 30 days.");

(16) information to assist University in assessing consultant's capability and financial resources to perform the requested services;

(17) information to assist University in assessing consultant's communication skills using all relevant media; and

(18) a signed original of the Execution of Offer posted at: http://esbd.cpa.state.tx.us/.

Selection Process:

Selection of the Successful Offer (defined below) submitted in response to this Invitation by the Submittal Deadline (defined below) will be made using the competitive sealed proposal process described in this section. After opening of the offers and upon completion of the initial review and evaluation of the offers, University may invite one or more selected consultants to participate in oral presentations. University will use commercially reasonable efforts to avoid public disclosure of the contents of an offer prior to selection of the Successful Offer.

University may make the selection of the Successful Offer on the basis of the offers initially submitted, without discussion, clarification or modification. In the alternative, University may make the selection of the Successful Offer on the basis of negotiation with any of the consultants. In conducting such negotiations, University will avoid disclosing the contents of competing offers.

At University's sole option and discretion, University may discuss and negotiate all elements of the offers submitted by selected consultants within a specified competitive range. For purposes of negotiation, University may establish, after an initial review of the offers, a competitive range of acceptable or potentially acceptable offers composed of the highest rated offer(s). In that event, University will defer further action on offers not included within the competitive range pending the selection of the Successful Offer; provided, however, University reserves the right to include additional offers in the competitive range if deemed to be in the best interests of University.

After submission of an offer but before final selection of the Successful Offer is made, University may permit a consultant to revise its offer in order to obtain the consultant's best and final offer. In that event, representations made by consultant in its revised offer, including price and fee quotes, will be binding on consultant. University will provide each consultant within the competitive range with an equal opportunity for discussion and revision of its offer. University is not obligated to select the consultant offering the most attractive economic terms if that consultant is not the most advantageous to University overall, as determined by University.

University reserves the right to (a) enter into a contract for all or any portion of the requirements and specifications set forth in this Invitation with one or more consultants, (b) reject any and all offers and re-solicit offers, or (c) reject any and all offers and temporarily or permanently abandon this selection process, if deemed to be in the best interests of University. Consultant is hereby notified that University will maintain in its files concerning this Invitation a written record of the basis upon which a selection, if any, is made by University. University reserves the right to accept or reject any or all offers, waive any formalities, procedural requirements, or minor technical inconsistencies, and delete any requirement or specification from this Invitation when deemed to be in University's best interest.

Criteria for Selection:

The successful offer (Successful Offer), if any, will be the offer submitted in response to this Invitation by the Submittal Deadline that is the most advantageous to University. The criteria to be considered by University in evaluating offers will be those factors listed below: 1. the consultant's demonstrated competence, knowledge, and qualifications; and 2. the reasonableness of the consultant's fee.

In accordance with §2254.027, *Texas Government Code*, if other considerations are equal, University will give preference to a consultant whose principal place of business is in the State of Texas or who will manage the contract wholly from an office in the State of Texas. Offers will be evaluated by University personnel and Committee. The selection of the Successful Offer, if any, will be based on the information provided by consultant in its offer. University may give consideration to any additional information if University deems such information relevant. The consultant submitting the Successful Offer will be required to enter into a contract acceptable to University.

Consultant's Acceptance of Offer Evaluation Methodology:

Submission of an offer by a consultant indicates: (1) consultant's acceptance of (a) the Selection Process, (b) the Criteria for Selection, and (c) all other requirements and specifications set forth in this Invitation; and (2) consultant's recognition that some subjective judgments must be made by University during this Invitation process.

Public Information:

Consultant is hereby notified that University strictly adheres to all statutes, court decisions and the opinions of the Texas Attorney General with respect to disclosure of public information. University may seek to protect from disclosure all information submitted in response to this Invitation until such time as a final contract is executed. Upon execution of a final contract, University will consider all information, documentation, and other materials requested to be submitted in response to this Invitation, to be of a non-confidential and non-proprietary nature and, therefore, subject to public disclosure under the Texas Public Information Act (*Texas Government Code*, §552.001, et seq.). Consultant will be advised of a request for public information that implicates their materials and will have the opportunity to raise any objections to disclosure to the Texas Attorney General. Certain information may be protected from release under §§552.101, 552.110, 552.113, and 552.131, *Texas Government Code*.

How To Respond; Submittal Deadline:

To respond to this Invitation, consultants must submit the information requested in the Specifications section of this Invitation and any other relevant information, in a clear and concise written format to: Ms. Jennifer C. Murphy, Director of Accounting & Purchasing Services, The University of Texas System, 702 Colorado Street, Suite 3.120, Austin, Texas 78701. Offers must be submitted in an envelope or other appropriate container. "Invitation No. RTT20080325" and the Submittal Deadline must be clearly shown in the lower left-hand corner on the top surface of such envelope or container. In addition, the name and return address of the consultant must be clearly visible.

All offers must be received at the above address no later than 5:00 p.m., March 25, 2008 (Submittal Deadline). Submissions received after the Submittal Deadline will not be considered.

Questions:

Questions concerning this Invitation should be directed to Ms. Jennifer C. Murphy, Director of Accounting & Purchasing Services, The University of Texas System, 702 Colorado Street, Suite 3.120, Austin, Texas 78701, email: jennifer.murphy@utsystem.edu. University may in its sole discretion respond in writing to questions concerning this Invitation. Only University's responses made by formal written addenda to this Invitation will be binding. Verbal and other written interpretations or clarifications will be without legal effect.

TRD-200801155
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: February 27, 2008

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## Notice After Entering Into Major Consulting Services Contract

The University of Texas System ("University"), in accordance with the provisions of *Texas Government Code*, Chapter 2254, entered into a contract for consulting services (the "Contract") with Mercer (US) Inc., formerly known as Mercer Human Resource Consulting, Inc., a Delaware Corporation ("Consultant") as more particularly described in the Invitation for Offer No. 109b.252, Consultation Services. The University of Texas System published the Invitation in the January 18, 2008, issue of the *Texas Register* (33 TexReg 633).

Project Description:

In accordance with the Invitation and Consultant's response thereto, Consultant shall provide University with an assessment of the competitiveness of the compensation currently provided to its police force.

Name and Address of Consultant:

Mercer (US) Inc.

10 South Wacker Drive, Suite 1600

Chicago, IL 60606

USA

Total Value of the Contract:

The contract stipulates payment of $18,000 for the first 9 positions analyzed and $750 for each additional position studied. Total fees paid for the Scope of Work shall not exceed $25,000 unless agreed in writing by University.

Contract Dates:

The contract was effective February 20, 2008 and the last day of the contract is March 31, 2008.

Due Dates for Contract Products:

The Contract terminates on March 31, 2008. A comprehensive report detailing the findings and recommendations, as well as supporting data will be given to University upon completion.

The individual to be contacted regarding this Consultant Contract is:

Gary Gwaltney, Manager of Compensation and Employment

The University of Texas System, 702 Colorado Street, Suite 2.100

Austin, Texas 78701

Phone: (512) 499-4487

Email: ggwaltney@utsystem.edu

TRD-200801140
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: February 26, 2008

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### Notice of an Amendment to an Existing Consulting Contract

Pursuant to *Texas Government Code*, §2254.030, The University of Texas System ("University") hereby provides notice of an amendment to an existing consultant contract with Strategic Management Systems, Inc., a Virginia Corporation ("Consultant").

Name and Address of Consultant:

Strategic Management Systems, Inc., 5911 Kingstowne Village Parkway, Suite 210 Alexandria, Virginia 22315

The University entered into a contract for consulting services with Strategic Management Systems, Inc. ("Consultant") as more particularly described in the invitation to consultants to provide offers of consulting services (the "Invitation"), published in the December 1, 2006, issue of the *Texas Register* (31 TexReg 9769).

Notification of the award of the Consultant Contract was published in the March 23, 2007, issue of *Texas Register* (32 TexReg 1804).

Notice of Intent to Amend the Consulting Services Contract was published in the November 16, 2007, issue of *Texas Register* (32 TexReg 8376).

Project Description:

In accordance with the Invitation and Contractor's response thereto, the Contractor agreed to conduct an evaluation of the compliance function at each U.T. System institution.

Total Value of the Contract: $775,000

Contract Dates: The Contract was executed by Consultant on February 27, 2007 and by University on March 6, 2007, and dated effective February 26, 2007.

Due Dates for Contract Products:

Each evaluation shall be concluded 90 days after initiation of the review.

The term of the Contract shall terminate on December 31, 2010.

On February 13, 2008, The University and Contractor agreed to amend the terms of the original agreement of February 26, 2007:

Questions concerning this amendment should be directed to Dr. Scott C. Kelley, Executive Vice Chancellor for Business Affairs, The University of Texas System, Austin, Texas 78701, (512) 499-4560; skelley@utsystem.edu.

TRD-200801099
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: Febraury 25, 2008

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## Texas Water Development Board

### Applications Received

Pursuant to the Texas Water Code, §6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

Sandy Land Underground Water Conservation District, 1012 Avenue F, P.O. Box 130, Plains, Texas 79355, received 01/09/08, application for financial assistance in the amount of $500,000 from the Agricultural Water Conservation Program.

City of Rollingwood, 403 Nixon Drive, Rollingwood, Texas 78746, received 12/21/07, application for financial assistance in the amount of $2,350,000 from the Drinking Water State Revolving Fund.

City of Fort Worth, 1000 Throckmorton, Ft. Worth, Texas 76102, received 01/09/08, application for financial assistance in the amount of $64,930,000 from the Drinking Water State Revolving Fund.

City of Coleman, 200 W. Live Oak, P.O. Box 592, Coleman, Texas 76834, received 1/2/08, application for financial assistance in the amount of $5,910,000 from the Drinking Water State Revolving Fund.

Gause Water Supply Corporation, P.O. Box 150, Cameron, Texas 76520, received 1/10/08, application for financial assistance in the amount of $42,000 from the Rural Water Assistance Fund.

Greater Texoma Utility Authority on behalf of the City of Melissa and the City of Anna, 5100 Airport Drive, Denton, Texas 75020, received 12/28/07, application for financial assistance in the amount of $1,400,000 from the Texas Water Development Fund.

TRD-200801152
Ingrid K. Hansen
Acting General Counsel
Texas Water Development Board
Filed: February 26, 2008

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### Request for Applications for Grants under the Federal Emergency Management Agency Severe Repetitive Loss Program

The Texas Water Development Board (Board), as administrator of the Severe Repetitive Loss (SRL) Program on behalf of the Federal Emergency Management Agency (FEMA), requests the submission of applications leading to the possible award of SRL Program Grants from communities within the State with the legal authority to mitigate the impacts of flooding, and which participate in the National Flood Insurance Program (NFIP), in accordance with FEMA policy and regulations set forth in Title 44 of the Code of Federal Regulations (CFR) Part 79 (44 CFR 79). A community is defined as (a) a political subdivision, including any Indian tribe or authorized native organization, that has zoning and building code jurisdiction over a particular area having special flood hazards, and which is participating in the NFIP, or (b) a political subdivision or other authority that is designated to develop and administer a mitigation plan by political subdivisions, all of which meet the requirements of (a). Eligible applicants from any area of the state may submit applications for SRL Program Grants. Eligible applicants for SRL Program Grants must have a FEMA approved Hazard Mitigation Action Plan.

Description of SRL Program Purpose and Objectives. The purpose of the SRL Program is to reduce or eliminate the risk of flood damage to severe repetitive loss residential structures insured under the NFIP. An SRL property is defined by FEMA as a residential property that is covered under an NFIP flood insurance policy and: (a) has at least four NFIP claim payments (including building and contents) of over $5,000 each, and the cumulative amount of such claims exceeding $20,000; or (b) at least two separate claims (building payments only, excluding claims for contents losses) with cumulative claims exceeding the market value of the structure. For both (a) and (b), at least two of the referenced claims must have occurred within any ten-year period, and must be greater than ten days apart. The long-term goal of the SRL Program is to reduce or eliminate claims under the NFIP. The SRL Program will provide funding assistance for eligible flood mitigation projects which will result in the greatest savings to the National Flood Insurance Fund in the shortest period of time, based on a Benefit-Cost Ratio using FEMA approved methodology to conduct the Benefit-Cost Analysis.

Description of Funding Considerations. The SRL Program is subject to the availability of federal funding, as well as any directive or restriction made with respect to such funds. The available state wide allocated amount for Federal Fiscal Year 2008 is expected to be about $25,000,000. These grants all require a 25 percent local match, of which any part or all may be in the form of in-kind services. There are no award limits or project limits associated with grant requests for the SRL Program.

Consultation with the Property Owner. The consultation process is a required notification and information gathering process which is conducted by the applicant prior to the submittal of the application. The applicant will consult with the property owner on project activity types, estimated costs, and insurance implications, as well as, the property owner's right to appeal. The applicant should be clear to the property owner that the consultation does not represent a formal offer of mitigation assistance. In addition, as part of the consultation process, each interested property owner should sign documentation of Notice of Voluntary Participation which will be provided by the applicant as part of the application submittal.

Deadline, Review Criteria and Contact Person for Additional Information. Following the consultation process, the applicant is required to submit applications electronically through FEMA's web-based Electronic Grants Management System (e-Grants). Applicants must request access into the e-Grants system. Access requests should be directed to Gilbert Ward at (512) 463-6418, or by e-mail to gilbert.ward@twdb.state.tx.us at least by March 31, 2008. Deadline for submitting applications to the Board for SRL Program Grant funds is 5:00 p.m., April 15, 2008. Applications will be evaluated according to federal rules and guidance. For additional information concerning the SRL Program, current program guidance, and links to federal rules, go to www.fema.gov/government/grant/srl/index. For additional information on FEMA's e-grant system, go to www.fema.gov/government/grant/egrants. Final awards for grant funding will be as approved by FEMA.

TRD-200801145
Ingrid K. Hansen
Acting General Counsel
Texas Water Development Board
Filed: February 26, 2008

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## Request for Applications for the State Fiscal Year 2008 Agricultural Water Conservation Fund

The Texas Water Development Board (TWDB) solicits Request for Applications (RFAs) for the state fiscal year 2008. The total amount of the grants to be awarded by the TWDB shall not exceed $600,000 from the Agricultural Water Conservation Fund. The rules governing the Agricultural Water Conservation Fund (31 Texas Administrative Code, Chapter 367), guidelines, and instructions are available upon request from the TWDB.

**Summary of the RFA**

Solicitation Date (Opening): Date published in the *Texas Register*

Due Date (Closing): 60 days after RFA is published in the *Texas Register*.

Anticipated Award Date: Approximately by July 1, 2008

Estimated Total Funding: $600,000

Eligible applicants: State Agencies and Political Subdivisions

Contact: Aung K. Hla

Team Lead, Agricultural Water Conservation Section

Texas Water Development Board

P.O. Box 13231, Austin, Texas 78711-3231

Phone: (512) 463-7940

E-mail: aung.hla@twdb.state.tx.us

**Objectives**

Grants will be made available to state agencies and political subdivisions for projects that will encourage and expedite the implementation of agricultural water conservation best management practices. Funds will be made available through a statewide competitive grants process. Applications are requested for funding projects under three different categories:

**1. Irrigation Water Use Metering**

This category includes the purchase, installation, maintenance and data collection services of irrigation meters. The meters must be installed with the intent that the cooperating producer will make optimum use of it, maintain it properly and also support the collection and dissemination of water use data. The applicant is required to provide TWDB five years of data on annual irrigation water use estimates (per acre by crop) for each meter installed.

**2. Innovative Technology**

The proposed innovative project must develop adaptive tools for the implementation of new systems that would demonstrate and facilitate technically sound conservation decisions by producers. The applicants are encouraged to identify promising conservation technologies that may include installation of instrumentation and devices for optimizing and benchmarking irrigation systems' performances. To be given priority consideration, the innovative technology should be adaptable, transferable, and the expected outcomes or impacts of the technology should be measurable.

**3. Evaluation of Evapotranspiration (ET) Networks in Texas**

Provide consultancy services to undertake a detailed inventory of active weather stations collecting evapotranspiration data in the state of Texas and thoroughly assess their performance and usability. These weather stations must be equipped to estimate reference evapotranspiration (grass or alfalfa) and also measure precipitation amounts on a daily basis. The criterion to assess the performance of evapotranspiration Networks will be based on but limited to the following: proper location of the station, the quality of sensors and relevant hardware, data retrieval and collection methods, algorithms used for data analyses, and identification of strategies employed for the dissemination of information and for marketing of evapotranspiration network products to their clients.

**Selection and Award**

All proposals will be evaluated based upon the specific criteria set forth in this solicitation. TWDB reserves the right to reject any or all applications if staff determines that the application(s) does not adequately meet the required criteria or if the funding available is less than the requested funding.

**Description of Applicant Criteria**

The applicable scope of work, schedule, and contract amount will be negotiated after the TWDB selects the most qualified applicants. Failure to arrive at mutually agreeable terms of a contract with the most qualified applicant shall constitute a rejection of the Board's offer and may result in subsequent negotiations with the next most qualified applicant. The TWDB reserves the right to reject any or all applications if staff determines that the application(s) does not adequately meet the required criteria or if the funding available is less than the requested funding.

**Deadline for Submission of Applications**

Six double-sided, double-spaced copies of a completed application must be filed with the TWDB within 60 days of the publication of this RFA. Applications can be directed either in person to David Carter, Texas Water Development Board, Stephen F. Austin Building, Room 531, 1700 North Congress Avenue, Austin, Texas 78701; or by mail to David Carter, Texas Water Development Board, P.O. Box 13231--Capitol Station, Austin, Texas 78711-3231. All applicants should obtain the TWDB's guidelines and instruction sheet for responding to the RFA.

TRD-200801171
Ingrid K. Hansen
Acting General Counsel
Texas Water Development Board
Filed: February 27, 2008

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## Request for Statements of Qualifications Water Research Study Priority Topics

The Texas Water Development Board (board) requests the submission of Statements of Qualifications (SOQs) from interested applicants leading to the possible award of contracts for state fiscal year 2008 to conduct water research on six priority topics. The total amount of the grants awarded by the board shall not exceed $500,000 from the Research and Planning Fund. Rules governing the Research and Planning Fund (31 Texas Administrative Code, Chapter 355) are available upon request from the board, or may be found at the Secretary of State's Internet address: http://www.sos.state.tx.us/tac/; then sequentially select, "TAC Viewer," "Title 31," "Part 10," "Chapter 355," and "Subchapter A." Guidelines for responding to the SOQ, which include an application form and detailed information on the research topic, will be available at the board's website at: http://www.twdb.state.tx.us/publications/requestforproposals/requestforproposals_index.asp, or will be provided upon request.

**Description of the Research Objectives and Purpose**

Statements of Qualifications are requested for the following six priority research topics.

**1. Effect of roof material on water quality for rainwater harvesting systems.**

The effect of roof material on runoff water quality for rainwater harvesting is one of the most common concerns expressed by current and potential users of rainwater harvesting. There is a lack of data to respond to these concerns. A scientific review of the water quality effect of roof materials commonly used in Texas such as asphalt shingles, galvanized metal, tiles, and others will provide useful information for designers, installers and users of rainwater harvesting systems.

This research effort would involve the following:

*****identifying and characterizing the more common roofing materials used in Texas;

*****designing and implementing a study methodology to determine the potential water-quality effects of roof materials on rainwater harvesting;

*****collecting the data;

*****performing the necessary laboratory work;

*****analyzing and reporting the results of the study; and

*****issuing recommendations regarding roof materials for rainwater harvesting.

TWDB will first consider opportunities to conduct this research in partnership with an institution of higher education through an internship contract.

**2. Assessment of osmotic mechanisms pairing desalination concentrate and wastewater treatment.**

Disposal of desalination concentrate is a major cost component of water desalination. Useful applications of the desalination concentrate can significantly reduce the cost of water desalination. A potential beneficial application is to take advantage of the high salinity level of desalination concentrate by using it as a draw solution in a forward osmosis process to remove pure water from wastewater.

The desired study will:

*****examine the mechanics of forward and reverse osmosis water treatment,

*****assess the feasibility of using high salinity streams to extract pure water out of wastewater streams,

*****determine the characteristics required for cost-effective application of forward osmosis to wastewater treatment with desalination concentrate as a draw solution, and

*prepare a report describing the results of the research and providing recommendations for future related work.

**3. High School Water Resource Education Program.**

The TWDB seeks to develop Texas-specific high school curricular resources centered on the topic of water. Integral to this program is the development of internet-based learning activities which facilitate student access to real data from the TWDB and other resources.

Program development must include the following:

*A web-interface for high school students that will allow them to explore, research, and build understanding about water science and the critical water-related issues of our state.

*Development of internet-based learning activities which facilitate student understanding of water resources while also fulfilling some of the requirements of the high school science courses such as chemistry, biology, integrated physics and chemistry, aquatics, AP science courses, and the new engineering and earth and space science courses.

*A water resource curriculum that meets the needs of a diverse population of Texas high-school students and is accessible in a web-based environment.

*An engaging, relevant, research-based water resource curriculum that incorporates graphics and animations as well as hands-on/minds-on inquiry and problem-based instructional approaches to learning.

*The capability for TWDB staff to maintain the web-interface and curriculum resources with updates, as necessary.

*All student activities and materials developed should be correlated with the Texas Essential Knowledge and Skills requirements for high school science courses.

*Inclusion of Texas high school teachers in a focus group to help identify specific topics for curricular development and to review the program prior to completion.

**4. Storm Water Reuse as a Water Management Strategy.**

Meeting future water supply needs of Texas will involve implementing a variety of alternative water management strategies including water reuse, water desalination, and other water conservation measures. One such alternative strategy, storm water reuse, has begun to be seriously considered on a global basis. With the population of Texas almost doubling in the next 30 years there will be substantial increases in impervious land cover that may result in large quantities of future storm water not historically available.

Smaller scale methods of storm water reuse (e.g. rainwater harvesting) have already been evaluated by the Texas Water Development Board. However, implementing storm water reuse on a much larger scale, for example at large commercial developments or within municipal districts, has not been adequately evaluated for Texas. There are a number of issues related to storm water reuse including water availability and water rights, technical approaches, and environmental considerations that are poorly understood.

Understanding both technical and legal issues, as well as the broader advantages and drawbacks of larger scale storm water reuse, will help determine whether and/or where in Texas it should be considered as a viable water management strategy.

The research should:

*Perform a literature search to identify and document the current state of technology and applicable legal issues related to storm water reuse.

*Develop an approach for determining the probable quantities of historical and future storm water.

*Develop information regarding practices and technology for harvesting storm water including health and reliability issues as a water supply.

*Develop information regarding alternative practices and technologies for treatment and reuse of the storm water.

*Define legal issues related to reuse of the historical and future storm water.

*Define issues related to the potential impacts of reusing storm water on downstream ecology.

*Identify regions in Texas with the greatest potential for storm water reuse projects.

*Discuss the issues and implications associated with various scales and forms of storm water reuse strategies.

This research will develop information to aid regional water planning groups in assessing the viability of storm water reuse as a water management strategy. Ideally, a guidance document would be prepared for use by entities in developing storm water reuse strategies in those particular areas where conditions provide an opportunity for storm water reuse.

**5. Model Subdivision Rules Training CD.**

With the passage of House Bill 467 (79th Regular Legislature, 2005), the pool of cities and counties eligible to apply for financial assistance to address inadequate water and wastewater infrastructure under the Texas Water Development Board's (TWDB) Economically Distressed Areas Program (EDAP) has greatly expanded. Consequently, the number of cities and counties that could be required to adopt and enforce Model Subdivision Rules, which are designed to prevent substandard residential development, has the potential to grow exponentially. Those newly eligible counties, which would adopt Model Subdivision Rules under Subchapter C, Chapter 232, Local Government Code, and cities, which would adopt Model Subdivision Rules under Chapter 212, Local Government Code, may lack the knowledge of the purpose and benefits of Model Subdivision Rules, how to effectively implement them and change the way residential subdivision development is conducted to ensure adequate water and wastewater for these new developments.

The TWDB's Administrative Rules (31 TAC Chapter 363, §363.504(a)(1)(E)) require a county or municipality required or authorized to adopt Model Subdivision Rules to complete a training course of not more than two hours within one year of submitting an application for financial assistance from the Economically Distressed Areas Program. The purpose of this study is to research the important statutory and regulatory requirements of Model Subdivision Rules. Results of the study will provide local elected officials, local government staff, residential subdivision developers, engineers, the real estate industry, state regulators and homeowners, who all play a critical role in the Model Subdivision Rule process, with a tool to assist them in the adoption, compliance and enforcement of Model Subdivision Rules that ensure adequate water and wastewater services for residential subdivisions. The training will assist these communities with developing quality applications for the financial assistance available from the Economically Distressed Areas Program using samples, forms, exhibits, timelines and schedules that can be incorporated in required documents.

In developing the training tool, the study should also include video, photographs, pictures, graphics and other audio and visual tools to highlight, enlighten, encourage and educate the decision-makers, implementers and enforcers of the Model Subdivision Rules and the potential applicants of financial assistance through the Economically Distressed Areas Program. The end product will be a high-quality, pro-

fessionally-developed narrated computer-aided training program that creatively and effectively instructs and guides users through the Model Subdivision Rule adoption and implementation process. The TWDB will receive a minimum of 10 copies of the training CD and 10 printed copies of a Model Subdivision Rule resource manual that includes relevant, statutes, rules, policies, samples, forms, exhibits, timelines, schedules and any other information that might be useful and beneficial in training the intended audience.

**6. Uncertainty and Risk in the Management of Water Resources.**

The 2007 State Water Plan contains 4,500 water management strategies needed to meet the water supply needs of the state over the next 50 years. Implementation of individual water management strategies may not be possible due to permit requirements and the need for public support--details that are often not known in the early stages of planning. Further uncertainties exist due to surface and groundwater availability model inaccuracies, costs and funding sources, and unforeseen changes in the population dynamics of the state or region. The threat of climate change has also made water supply managers worry about the reliability of their existing supplies and if it is valid to assume that the next 50 years of hydrology will have droughts no worse than those seen in the past 50 years.

This research will investigate approaches for quantifying and considering uncertainties and risk in water resources planning and management, focusing primarily on climate change and implementation of water management strategies. Specifically, the deliverable will be a recommended approach for integrating risk and uncertainty into the current round of regional water planning in Texas. An example specific to a Water User Group or Regional Water Planning Group to demonstrate the applicability of the proposed approach is also expected.

**Description of Applicant Criteria.**

The applicant should: (1) demonstrate prior experience in the priority research topic; (2) be able to review, research, analyze, evaluate, and interpret data and research findings; and (3) have excellent oral presentation and writing abilities. An estimate of the total cost and a basic budget for the study is requested. This estimate is to be used by the board for an indication of total grant funding requested, will not be considered as a bid for the study, and will not be used in the evaluation process when selecting applications for consideration of approval for the research proposed. The board reserves the right to not accept any or all submissions based on availability of funding and its evaluation of the qualifications as submitted.

If the applicant is short-listed, the applicant should be prepared to make an oral presentation to board staff. The scope of work, schedule, and contract amount will be negotiated after the board selects the most qualified applicant. Failure to reach a negotiated contract may result in subsequent negotiations with the next most-qualified applicant; however, a negotiation will not occur with applicants who are determined by the board to be unqualified or otherwise unsuited to perform the requested research. Applicants selected to conduct the research may be required to present the results of their research at one or more of the board's monthly public meetings.

**Deadline for Submittal, Review Criteria and Contact Person for Additional Information.**

Historically Underutilized Businesses (HUBs) are encouraged to submit Statements of Qualifications and/or participate as subcontractors in the water research program. As instructed at Texas Government Code §2161.252 and Texas Administrative Code, Title 34, Part 1, Chapter 20, Subchapter B, §20.14, if the anticipated cost of the study is to exceed $100,000, the applicant must complete a HUB Subcontracting Plan according to: http://www.tbpc.state.tx.us/communities/procurement/prog/hub/hub-subcontracting-plan.

All applicants must obtain the board's guidelines for responding to the Statements of Qualifications. The guidelines are available at http://www.twdb.state.tx.us/publications/requestforproposals/requestforproposals_index.asp. Ten double-sided, double-spaced copies of a completed Statement of Qualifications must be filed with the board prior to 5:00 p.m., April 23, 2008. Respondents to this request shall limit their Statement of Qualifications to the size previously mentioned, excluding the resumes of the project team members.

Statements of Qualifications can be directed either in person to Mr. David Carter, Texas Water Development Board, Stephen F. Austin Building, Room 535, 1700 North Congress Avenue, Austin, Texas; or by mail to Mr. David Carter, Texas Water Development Board, P.O. Box 13231--Capitol Station, Austin, Texas 78711-3231.

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Ingrid K. Hansen
Acting General Counsel
Texas Water Development Board
Filed: February 27, 2008

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## How to Use the Texas Register

**Information Available**: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

**Governor** - Appointments, executive orders, and proclamations.

**Attorney General** - summaries of requests for opinions, opinions, and open records decisions.

**Secretary of State** - opinions based on the election laws.

**Texas Ethics Commission** - summaries of requests for opinions and opinions.

**Emergency Rules**- sections adopted by state agencies on an emergency basis.

**Proposed Rules** - sections proposed for adoption.

**Withdrawn Rules** - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

**Adopted Rules** - sections adopted following public comment period.

**Texas Department of Insurance Exempt Filings** - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

**Texas Department of Banking** - opinions and exempt rules filed by the Texas Department of Banking.

**Tables and Graphics** - graphic material from the proposed, emergency and adopted sections.

**Transferred Rules**- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

**In Addition** - miscellaneous information required to be published by statute or provided as a public service.

**Review of Agency Rules** - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

**How to Cite**: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

**How to Research**: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

## Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

**How to Cite**: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

**How to update**: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
***Part I. Texas Department of Human Services***
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).